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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

By FRANCIS M. DICE,

OFFICIAL REPORTER.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK. *†

HON. BYRON K. ELLIOTT. ‡§

HON. ALLEN ZOLLARS. †

HON. EDWIN P. HAMMOND. ‖

HON. WILLIAM E. NIBLACK. †

*Chief Justice at the November Term, 1883.

†Term of office commenced January 1st, 1883.

‡Chief Justice at the May Term, 1884.

§Term of office commenced January 3d, 1881.

‖Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.‡

HON. WALPOLE G. COLERICK.§

* Chief Commissioner.
† Appointed April 27th, 1881.
‡ Appointed May 29th, 1882.
§ Appointed November 9th, 1883.

OFFICERS

OF THE

SUPREME COURT.

CLERK,

SIMON P. SHEERIN.

SHERIFF,

JAMES ELDER.

LIBRARIAN,

CHARLES E. COX.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1883, IN THE SIXTY-EIGHTH YEAR OF THE STATE.

95	1
182	300
95	1
146	313
95	1
149	440
149	442
95	1
158	391
95	1
170	259

No. 11,152.

DAVIS *v.* KRUG.

DESCENTS.—*Inheritance from Adopted Child.—Rule of Inheritance.*—Where an adopted child dies intestate, unmarried and without lawful issue, or their descendants, surviving him or her, seized of real estate or owning personal property, which may have come to such child by gift, devise or descent from the adopting parent or parents, father or mother, such real estate or personal property shall descend to the adopting father or mother, if living, or, if dead, to the heirs at law of such adopting father or mother, to the entire exclusion of the natural heirs of such adopted child from any share or interest therein. *Barnhizel* v. *Ferrell*, 47 Ind. 335, so far as it is in conflict with this case, is overruled.

LAW OF THE CASE.—*Former Appeal.—Point in Judgment.—Supreme Court.*—Where there is a second appeal, the points in judgment, the questions which were before the court and *decided*, on the former appeal, will not be re-heard or re-examined by the Supreme Court on such second appeal, but will be adhered to as "the law of the case." But this rule will not preclude the Supreme Court from considering and deciding, on the second appeal, any questions which might have been, but were not, considered and decided as the case was presented on the former appeal.

PLEADING.—*Supplemental Complaint.*—Under section 399, R. S. 1881, a supplemental complaint is neither an amended complaint nor a substitute for the original complaint; but it is a further complaint, which, assum-

ing that the original complaint is to remain in the record, alleges new facts which have occurred after the filing of such original complaint.'

From the Montgomery Circuit Court.

E. C. Snyder and *P. S. Kennedy*, for appellant.

G. W. Paul and *J. E. Humphries*, for appellee.

HOWK, C. J.—This case is now before this court for the second time. When it was first here, the opinion and judgment of the court are reported under the title of *Krug* v. *Davis*, 87 Ind. 590.

The suit is by the appellee, Elizabeth Krug, as plaintiff, against the appellant, Isaac Davis, as defendant. The appellee's complaint originally contained two paragraphs, to each of which the appellant's demurrer, for the want of sufficient facts, was sustained by the court. The appellee declined to amend or plead further, and the court adjudged that she take nothing by her suit, and that the appellant recover of her his costs. On her appeal from this judgment, the only errors here assigned were the decisions below sustaining the demurrers to each paragraph of her complaint; upon consideration whereof this court reversed the judgment below and remanded the cause, with instructions to the circuit court to overrule the demurrers to each paragraph of complaint.

After the cause was returned into the circuit court, and the appellant's demurrers to each paragraph of complaint had been there overruled, in accordance with the mandate of this court, the appellee, with the leave of the court below first had, filed what is called a supplemental paragraph of complaint, making John E. Humphries a party defendant herein. The defendant Humphries appeared and answered, admitting the truth of all the facts stated in each paragraph and the supplemental paragraph of the complaint.

The appellant, Davis, answered the complaint and supplemental paragraph, in six paragraphs, of which the first was a general denial, and each of the other paragraphs stated special matter of defence. Appellee's demurrers were sus-

tained to the second, third, fourth and fifth paragraphs of appellant's answer; and to the sixth paragraph of such answer the appellee replied by a general denial. A change of judge having been moved for and granted, William W. Thornton, Esq., a competent and reputable attorney of the court, was duly appointed and qualified as special judge to try this cause. The issues joined were submitted to the court for trial; and, at the request of all the parties, the court made a special finding of the facts, and stated its conclusions of law thereon. Over the appellant's motion for a new trial, the court rendered an interlocutory judgment of partition, in accordance with its conclusions of law, awarding to the appellant, the appellee and the defendant Humphries each an equal one-third part in value of the real estate in controversy, and appointing commissioners to make such partition. Afterwards, the commissioners made and acknowledged, in open court, their written report of such partition, which was confirmed by the final judgment of the court, and from this judgment the appellant, Davis, alone prosecutes this appeal and has here assigned a number of errors.

This action was originally commenced on the fourth day of April, 1881, and, as we have said, the appellee's complaint then contained two paragraphs. On the former appeal, it is stated in the opinion of the court, that "both paragraphs contained substantially the same facts;" and a statement of those facts is given in the opinion. It is then said: "The only question presented is, was the complaint sufficient upon demurrer?" In other words, the question then was, were the facts stated in the complaint, and conceded to be true by the demurrer, sufficient in law to make a *prima facie* case in favor of the plaintiff? Upon certain concessions then made in argument by the learned counsel of the defendant, Davis, but now withdrawn, this court then held that the complaint was "sufficient upon demurrer," as to the only question then presented, considered or decided, namely, the authority and right of husband and wife, under the statute of this State, to join

in the adoption of a child. That is the precise point in judgment in our former decision of this case. *Krug* v. *Davis*, *supra*.

Each of the paragraphs of the original complaint appears in the transcript now before us, we may well suppose, precisely as they each appeared in the record of the cause, on the former appeal, *except* as each of them may be affected by what the appellee calls her supplemental paragraph of complaint. The name of John E. Humphries does not appear in either of the original paragraphs of complaint, although the appellee had leave to make him a defendant therein, and although, in his answer, he admitted the truth of the facts stated therein. But, after the cause was remanded by this court, as we have seen, the appellee, with leave of the trial court, filed what she termed a supplemental paragraph of complaint, "by way of supplement to each paragraph of complaint herein." Manifestly, the appellee was seeking to avoid, if possible, by filing this so-called supplemental paragraph, the appearance even of amending the original complaint, which this court had held to be "sufficient upon demurrer."

In section 399, R. S. 1881, which is a literal re-enactment of section 102, of the civil code of 1852, it is provided as follows: "The court may, on motion, allow supplemental pleadings, showing facts which occurred after the former pleadings were filed."

In *Musselman* v. *Manly*, 42 Ind. 462, after quoting the provisions of section 102 of the civil code of 1852, it is said: "A supplemental complaint is not, like an amended complaint, a substitute for the original complaint, by which the former complaint is superseded; but it is a further complaint and assumes that the original complaint is to stand. A supplemental complaint must consist of facts which had arisen since the filing of the original complaint. It may be filed after answer; but whether filed before or after answer, it must be filed on motion and by leave of the court, and must show upon its face that it is supplemental and relates to mat-

ters which had occurred subsequent to the commencement of the action. Matters which occurred prior to the filing of the original complaint, and not stated therein, should be brought into the suit by amendment. Matters which occurred since the filing of the complaint should be brought in by supplemental complaint." So, in *Patten* v. *Stewart*, 24 Ind. 332, it was held that the office of a supplemental complaint is to bring upon the record such new facts as have occurred since the filing of the original complaint, in order that the court may grant the proper relief upon the facts existing at the time of the final decree.

In the case at bar, the so-called supplemental paragraph of complaint covers nearly four pages of the record; and, while it states many facts, there is only one fact alleged therein whereof it can be said that it occurred subsequently to the commencement of the action. The transcript shows that on April 4th, 1881, the appellee filed her original complaint, in only one paragraph; that, on April 25th, 1881, she filed the second paragraph of her original complaint, and, on the same day, the appellant was ruled to answer; that afterwards, on April 26th, 1881, the appellant filed a demurrer to each paragraph of the original complaint; and that, on May 7th, 1881, appellant's demurrer to each paragraph of the original complaint was sustained by the court, and judgment was rendered accordingly.

In the so-called supplemental paragraph of appellee's complaint, the only fact stated, which could possibly be claimed to have occurred after the commencement of this suit, was that the appellee, Krug, on April 26th, 1881, sold and conveyed the undivided one-third part of the real estate in controversy to John E. Humphries, who still owned the same. It will thus be seen that the only fact stated in the supplemental paragraph, which occurred after the commencement of this suit, namely, the execution of appellee's deed to John E. Humphries, occurred twenty-two days after the filing of the original complaint in one paragraph, one day after the filing

of the second paragraph of such complaint, and on the same day on which the appellant appeared and filed his demurrer to each of such paragraphs of appellee's complaint.

As between the appellee, Krug, and John E. Humphries, the pleading subsequently filed by her may properly be denominated, perhaps, as a supplemental paragraph of complaint. But as between the appellee and the appellant, Isaac Davis, it is certainly a misnomer to denominate such subsequent pleading, on her part, a supplemental paragraph of complaint. As between them, such subsequent paragraph states no new facts which have occurred since the filing of the original paragraphs of complaint; and although it is called a "supplement to each paragraph of complaint herein," it is in fact, as between the appellee and the appellant, an amendment of each paragraph of the original complaint. Or, speaking more accurately, it is "an amended pleading of the same matter," embraced in the first and second paragraphs of complaint first filed, and therefore it only should have been certified to this court, under section 650, R. S. 1881, as a part of the record of this cause.

The facts stated in this so-called supplemental paragraph of complaint, except as to the defendant Humphries, do not differ materially from those alleged in the original complaint. It was shown thereby, in substance, that on and before the 18th day of February, 1869, the appellant, Isaac Davis, and Jessie Davis were husband and wife, and so continued to be until the death of the wife, Jessie Davis; that, on and before the day last named, the appellee was the mother of an illegitimate child, called Emily Davis, and having no other name, aged about six years, and she and the appellee lived with Isaac and Jessie Davis, from the birth of the child until Jessie's death; that, on such last named day, upon the joint petition of Isaac and Jessie Davis, and with the consent in open court of the appellee, the court of common pleas of Montgomery county made an order "That said Emily Davis be considered the child by adoption of Isaac Davis and Jessie

Davis, and acquire the same rights by descent, as she would if the child of said petitioners;" that afterwards, on the — day of October, 1870, Jessie Davis, the appellant's wife, and the mother by adoption of Emily Davis, departed this life, intestate, in Montgomery county, the sole owner in fee simple of the east half of section number seven, in township eighteen north, range five west, containing three hundred and twenty acres, in Montgomery county, and leaving as her only heirs at law the appellant, Isaac Davis, her husband, and the child, Emily Davis, her daughter by adoption; that Jessie Davis left surviving her no other child or children, except her daughter by adoption, Emily Davis; and that afterwards, on the — day of April, 1872, the child, Emily Davis, then aged about nine years, died intestate, unmarried and without issue, and without brother or sister, and leaving her natural mother, the appellee, as alleged, as her only heir at law. Upon the foregoing facts, the appellee averred that, upon the death of Jessie Davis as aforesaid, the undivided two-thirds part of the above described real estate descended to her adopted child, Emily Davis, and the remaining one-third part thereof was inherited by her surviving husband, the appellant, Isaac Davis; and that, upon the death of the child, Emily Davis, as aforesaid, the whole of her interest in the real estate was inherited by her natural mother, the appellee, to the entire exclusion of her adopted father, Isaac Davis, from any share or lot therein.

The appellee alleged that, having sold and conveyed one-half of her interest in the land to John E. Humphries, she and Humphries, and the appellant, were each the owner in fee simple of an equal undivided one-third part in value of the above described real estate, as tenants in common; and she demanded judgment for partition accordingly, and for all other proper relief.

Much has been said by the learned counsel of the respective parties, in their oral and printed arguments of this cause, with respect to what is called "the law of the case." On be-

half of the appellee, it is contended with much zeal and earnestness, that not only the point in judgment, on the former appeal, remains the law of the case through all of its subsequent stages, but also that we are now precluded from considering and determining any question, which might have been but was not considered and decided, as the case was presented on such former appeal. The point in judgment, on the former appeal of this cause, as we have already said, is that, under the statute of this State regulating the adoption of heirs, husband and wife are authorized to join in the adoption of a child. This was the only question then presented, considered and decided, and it was held that the statute should be so construed as to permit "husband and wife to jointly avail themselves of its provisions." Upon this point, in the original or principal opinion, it is said: "This construction is one which need never do any injustice, and may oftentimes promote the unity and joint interests of families wishing to adopt the children of other persons." And, in the opinion overruling the petition for a rehearing, it is further said: "The purpose which the statute we are examining was intended to accomplish, was to enable parents to adopt as their own the children of others, and to secure for the adopted child the parental affection of both a father and a mother. As the adopted child of both the husband and wife, it would stand much more nearly in the place of a natural child, than if it were made the child of only one of them by adoption, and this is where the Legislature meant it should stand."

An examination of the opinions of the court, on the former appeal in this case, will clearly show that the only ground upon which the appellant, then appellee, asked for the affirmance of the judgment then appealed from, was, that the adoption of the child, Emily, by the appellant and his wife, was "wholly unauthorized and void," as to the appellant's wife. As to all other grounds, upon some of which, perhaps, the judgment might then have been affirmed, the learned counsel of

the appellant, then appellee, expressly waived their consideration by this court, by their concession then made, but now withdrawn, that the validity of the judgment then appealed from rested entirely upon the theory that, under the statute of this State, the adoption of a child by husband and wife was wholly unauthorized and void as to the wife. When, therefore, on the former appeal, we reached the conclusion that the statute of this State, when fairly construed, authorized husband and wife to join in the adoption of a child, there remained no other question to be decided, as the case was then presented, and, certainly, no other question was then decided. The conclusion then reached is the point in judgment, on the former appeal, and is and will remain the law of the case until it is finally determined. *Rinard* v. *West*, 92 Ind. 359.

In Buskirk's Practice, p. 371, in speaking of "the law of the case," it is said: "None of the questions which were before the court and *decided* on the first appeal can be re-heard or re-examined upon the second appeal." *Dodge* v. *Gaylord*, 53 Ind. 365; *Kress* v. *State, ex rel.*, 65 Ind. 106; *Test* v. *Larsh*, 76 Ind. 452; *Board, etc.*, v. *Indianapolis, etc., R. W. Co.*, 89 Ind. 101. The rule of "the law of the case," thus limited to the point or points considered and decided on the first appeal, meets our full approval. But we can not agree to the claim of appellee's counsel, that "the law of the case" precludes us from considering and deciding now, on the second appeal of this cause, any questions which might have been, but were not, considered and decided as the case was presented on the first appeal. Such claim seems to us unreasonable, although we are aware that it is supported by many respectable authorities, and even by the language used in some of the reported opinions of this court.

The appellant's counsel, *arguendo*, say that they "do not ask the court to review its ruling on the first appeal;" and, certainly, we do not propose to review such ruling, because we think that the point then decided is manifestly right, and

in perfect unison with the legislative intent, in the enactment of our statute for the adoption of heirs. But we do propose to decide a question or questions, which might and ought to, perhaps, and doubtless would, have been decided on the first appeal of this cause, had their consideration and decision not been waived by the concessions, in argument, of the counsel of appellant, then appellee.

We may premise by saying that it seems to us, no one can study the opinions of this court, and the reasons and arguments advanced therein in support of the only point decided on the first appeal, without arriving at the conclusion that they are utterly inconsistent and at war with the doctrine or law of *Barnhizel* v. *Ferrell*, 47 Ind. 335. If we are right in our interpretation of the legislative intention, in the enactment of our law for the adoption of heirs, then it must be that the adopting father or mother, or his or her heirs, will inherit from the adopted child all such property, real and personal, as came to such child by gift, devise or descent, from the adopting parent or parents, whenever he, she or they would have inherited such property, if the adopted child had been the natural child of the adopting father or mother. In such case and as to such property, we are of opinion that the adopting father or mother, or his or her heirs, will inherit from the adopted child, to the entire exclusion of the natural heirs of such child. This accords fully and is in perfect harmony with what we said in the opinions delivered on the former appeal of this cause, as follows: "The effect of our decision is to place a child, adopted by husband and wife jointly, in substantially the same position as that of a natural child, and when the child takes this place there are long settled rules which will determine and control the rights of all the interested parties, and there is neither confusion nor uncertainty." Our conclusion is, also, in entire harmony with the amendatory act of March 2d, 1883, which, enacted as it was so soon after our opinions were announced on the first appeal, we re-

gard as in the nature of a declaration of the General Assembly of what the law ought to be in such a case as the one at bar. In that act it was declared as follows: "That should such adopted child die intestate, without leaving wife or husband, issue or their descendants, surviving him or her, seized of any real estate or owning any personal property which may have come to such child by gift, devise or descent from such adopting father or mother, such property so coming to such adopted child shall, on its death, descend to the heirs of said adopting father or mother the same as if such child had never been adopted." Acts 1883, p. 61.

Under the law as declared in the opinions on the former appeal of this cause, and as we now state it clearly and explicitly, and upon the facts stated in each paragraph of appellee's original complaint, and in her so-called supplemental complaint, we are of opinion that the real estate in controversy, on the death of the adopted child, Emily, descended to its adopting father, the appellant, to the entire exclusion of its natural mother, the appellee, from any share or interest therein. It follows, therefore, that appellant's demurrers to each paragraph of the complaint, and to the so-called supplemental paragraph of complaint, ought to have been sustained by the court.

As this conclusion probably disposes of appellee's case, and leads to the reversal of the judgment below, we need not consider any of the other errors complained of.

In so far as our decision in this case is in conflict with *Barnhizel* v. *Ferrell*, *supra*, the latter case is overruled.

The judgment is reversed with costs, and the cause remanded with instructions to sustain the demurrers to each paragraph of complaint, original and supplemental, and for further proceedings not inconsistent with this opinion.

Filed March 12, 1884; petition for a rehearing overruled April 26, 1884.

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No. 11,045.

WESTERN UNION TELEGRAPH COMPANY *v.* PENDLETON.

TELEGRAPH.—*Failure to Transmit Message Beyond State.—Penalty.—Constitutional Law.—Interstate Commerce.—Police Power.*—The statute, R. S. 1881, section 4176, imposing a penalty upon a telegraph company for failure to transmit a message as therein required, even as applied to a message sent to another State, is not a violation of the Constitution of the United States giving to Congress the power to regulate commerce between the States, but is a valid exercise of the police power which belongs exclusively to the States.

SAME.—*Statute Construed.*—The sender of the message has the right to recover the penalty given by the statute. It is a penalty for a breach of duty arising in this State, and not damages for the breach of contract, and the right to recover is not affected by the fact that the particular act constituting the specific breach of duty occurred in another State.

From the Shelby Circuit Court.

J. E. McDonald, *J. M. Butler* and *A. L. Mason*, for appellant.

E. K. Adams and *L. J. Hackney*, for appellee.

ELLIOTT, J.—Our statute provides that a telegraph company with a line of wires wholly or partly within the State shall, during the usual office hours, receive despatches, and, on payment or tender of the usual charges, according to the regulation of the company, transmit messages with impartiality and good faith in the order in which they are received, and, for a failure to perform this duty, shall be liable to a penalty of $100, to be recovered by the person whose despatch is postponed or neglected.

The validity of this statute is contested upon the ground that it infringes the provision of the Constitution of the United States which invests Congress with power "to regulate commerce with foreign nations and among the several States." This position can not, of course, be even plausibly maintained in cases where the line is wholly within the State; in such cases the business is purely domestic and not inter-

state, but here the line of the company extends beyond the State, and the message delivered to the company was undertaken to be transmitted to a point in Iowa.

The telegraph is an instrument of commerce. Intercourse by telegraph is commercial intercourse, and where it extends beyond the State is interstate and subject to the control of Congress. *Pensacola Tel. Co.* v. *Western U. T. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460.

There is much conflict of opinion in the decisions of the courts of last resort upon this subject, and it will be found to be no easy task to extract from the decisions well defined rules. The study of the many able opinions that have been delivered by our great judges, beginning with that of the great chief justice, JOHN MARSHALL, is an interesting one, but we do not feel called upon to review these cases. Three theories seem to have been maintained, one that the States can not legislate upon the subject at all, whether Congress has or has not exercised the power vested in it; another, that when Congress has exercised its power, the States can adopt no valid legislation; and still another, that the States may legislate upon the subject even though Congress has exercised the power vested in it by the Constitution. We think, however, that the ultimate conclusion deducible from the later decisions is, that the States can not embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one State, lay burdens upon the instruments of commerce, or exact licenses from persons, natural or artificial, engaged in interstate commerce, and that this is so whether Congress has or has not legislated upon the subject. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Willson* v. *Blackbird, etc., Co.*, 2 Peters, 245; *City of New York* v. *Miln*, 11 Peters, 102; *Thurlow* v. *Massachusetts*, 5 How. 504; *Smith* v. *Turner*, 7 How. 283; *Cooley* v. *Board, etc.*, 12 How. 299; *State* v. *Wheeling, etc., Co.*, 13 How. 518; *Smith* v. *State*, 18 How. 71; *Gilman* v. *Philadelphia*, 3 Wal. 715; *Railroad Co.* v. *Pennsylvania*, 15 Wal. 232; *Welton* v.

State, 91 U. S. 275; *Cook* v. *Pennsylvania*, 97 U. S. 576; *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, *supra*.

Accepting this conclusion as the law which rules our decision, we still have no hesitation in affirming that our statute is not borne down by it. No discrimination is made in favor of any person, or in favor of any article of commerce; the freedom of commercial intercourse is not abridged, and no new duty or burden is imposed upon the company. The statute secures to all alike the privilege of demanding that the duties of the corporation be performed with diligence, impartiality and good faith. It enforces an existing duty, and provides a penalty, but it confines the duty to no class and denies the penalty to none. It is impossible to conceive the slightest restriction upon commercial intercourse, or the faintest discrimination in favor of any person or thing. Granting, then, the lack of power in the State to abridge the freedom of commerce, or to discriminate in favor of men or things, we may still maintain that telegraph companies, having offices and doing business in our State, may be compelled to discharge their duties diligently and impartially, because in requiring this a police power, inherent in all sovereignties, is rightfully exercised. We do not maintain that, under the guise of a police regulation, the State can abridge the freedom of commercial intercourse, or discriminate in favor of the products of one State, or grant commercial rights to the citizens of some particular State and deny them to others, but we do maintain that the sovereign State has power to enact laws requiring persons, artificial or natural, doing business within its borders, to transact that business with fairness, diligence and impartiality. A statute operating upon persons within the State, declaring an existing duty, adding neither new nor additional ones, usurps no functions of the Federal Congress, and infringes no constitutional provision. We are not willing to concede that the police power inherent in all sovereignties is annihilated in all matters touching interstate commerce by the provisions of the National Consti-

tution to which we have referred; on the contrary we are satisfied that the power is not impaired or limited, except to the extent that it may not be exercised in such a manner as to abridge, embarrass, or interfere with the freedom of interstate commerce, or so as to encroach upon valid congressional legislation. The right to exercise the police power is not so hedged in as that it can not be exercised upon instruments or articles of commerce; it may be exercised, even in commercial affairs, provided that it is not so exercised as to impose burdens or restrictions which limit or impede the free course of commerce. *Sherlock* v. *Alling*, 93 U. S. 99; *County of Mobile* v. *Kimball*, 102 U. S. 691.

The police power is the right to regulate the enjoyment of property, to maintain public order, to secure the rights of citizenship, and to prevent injury to private rights. This power can not be exercised within State limits by the Congress of the Nation. *United States* v. *Dewitt*, 9 Wal. 41; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Cruikshank*, 92 U. S. 542; *Munn* v. *Illinois*, 94 U. S. 113; *Civil Rights Cases*, 109 U. S. 3. The power of enacting laws upon this subject resides solely and exclusively in the States, and extends to all matters of personal and property rights within the States. A denial of the right to legislate upon matters connected with commerce and its instrumentalities would result in evils of great magnitude. If there be no such power, then the State can not regulate the speed of railroad trains where the railroad line extends beyond the State, nor enact any law providing for the safety of passengers and the community, and if the States possess no such power, then it has no existence, because, by the conclusive adjudications of the highest court, the police power does not reside in Congress. The States must, and do, possess this power, even with respect to commercial affairs. True, the power is somewhat limited, but it nevertheless exists.

We assume that the power to enact laws declaratory of a duty exists, and it remains to determine whether our statute

is a valid exercise of this sovereign power. In *Munn* v. *Illinois, supra*, the act of the Legislature of Illinois providing for the storage and shipment of grain by warehousemen was held valid, and in speaking of the effect of the constitutional provision respecting commerce, the court said of the warehousemen: "Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside of its immediate jurisdiction."

The court in another case said: "Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." *R. R. Co.* v. *Penn.*, *supra*. Strong language was used in *City of New York* v. *Miln*, *supra*, but we only have space for the following brief extract: "That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive." This language was used in a case where the State law directly affected, and in a very material degree, foreign commerce. The case from which we have quoted, and its principle, have been applied in many instances, and among the cases furnishing a striking illustration of the rule declared and of its application is that known as the *Slaughter House Cases*, 16 Wal. 36. In the case of *Cooley* v. *Board, etc.*, *supra*, a State law requiring vessels to take pilots, and prescribing a penalty for a breach of duty, was held valid. The court sustained a State statute, levying taxes upon articles of commerce in *Woodruff* v. *Parham*, 8 Wal. 123. It was said of that statute, what may with truth be said of ours, that "There is no attempt to discriminate injuriously against the products of other States or the rights of their

citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama." Judge Cooley says: "And it can not be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every reasonable provision for carrying with safety and expedition." Cooley Const. Lim. (5 ed.) 718. In *Harrigan* v. *Connecticut River, etc., Co.*, 129 Mass. 580 (37 Am. R. 387), a statute prohibiting, except in a specified manner, the rafting of logs from another State through Massachusetts was held valid, and this decision certainly goes much farther than we are required to do here. It has been held by this court in several cases, that the statute may be enforced although the message is received for transmission to another State, and if we should hold the law invalid we should be compelled to overrule these cases. *Western Union Tel. Co.* v. *Lindley*, 62 Ind. 371; *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181; *Carnahan* v. *Western Union Tel. Co.*, 89 Ind. 526. This doctrine has been asserted by other courts. *Western Union Tel. Co.* v. *Blanchard*, 68 Ga. 299; S. C., 45 Am. R. 480, 486, auth. n. It is true that in these cases the constitutional question was not argued, but it is nevertheless involved and was necessarily decided. We are satisfied that the enactment of our statute was a legitimate exercise of the police power of the State, and that as the statute infringes no provision of the Constitution, trenches upon no law of Congress, and does not interfere with the freedom of interstate commerce, it is valid and effective.

It is argued that, as the message was received for transmission to a point in Iowa, the place of performance is not in this State, and, therefore, our law can not prevail. This argument rests upon an assumption that can not be made

good. The action is not for a breach of contract, but to recover a penalty given to the sender of a message for a breach of duty by the telegraph company. The argument of counsel is able and ingenious, but it is plainly fallacious. No question of the right to damages is involved, the single question is as to the right to recover a statutory penalty. Counsel are in error in asserting that there is conflict in our cases upon this subject; from first to last it has been steadily held that the statute is a penal one, awarding, not liquidated damages, but a penalty. It is also decided by these cases that the foundation of the right is the contract with the corporation, but in none of them is it intimated that the recovery is for damages for a breach of contract; on the contrary, all our decisions affirm that the recovery is for a penalty given by statute to a private individual. *Carnahan* v. *Western Union Tel. Co., supra; Western Union Tel. Co.* v. *Adams*, 87 Ind. 598 (44 Am. R. 776); *Western Union Tel. Co.* v. *Roberts*, 87 Ind. 377; *Western Union Tel. Co.* v. *Gougar*, 84 Ind. 176; *Rogers* v. *Western Union Tel. Co.*, 78 Ind. 169 (41 Am. R. 558); *Western Union Tel. Co.* v. *Axtell*, 69 Ind. 199; *Western Union Tel. Co.* v. *Lindley, supra; Western Union Tel. Co.* v. *Ferguson*, 57 Ind. 495; *Western Union Tel. Co.* v. *Hamilton, supra; Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429 (9 Am. R. 744); *Western Union Tel. Co.* v. *Ward*, 23 Ind. 377.

The action given by the statute is for a penalty, and the right to maintain it is in the sender of the message, who pays or tenders the compensation provided by the rules and regulations of the company. The cases we have cited all proceed upon this theory, and it is clear that under the provisions of the statute no other theory could be correct. The English cases deny that the person to whom the message is sent can maintain an action for damages against the company for the reason that there is no privity of contract. *Dickson* v. *Reuter's Tel. Co.*, L. R. 2 C. P. D. 62; *Playford* v. *U. K. Tel. Co.*, L. R. 4 Q. B. 706. The American cases however take a different view of the subject, for they hold that if the error occurs in

transmitting the message, the person to whom the message is sent may maintain an action for damages, but, while this is held, it is conceded that the holding constitutes an exception to the general rule. *Western Union Tel. Co.* v. *Blanchard*, 45 Am. R. 486 n.; 2 Wharton Con., section 791; 17 Cent. L. Jour. 466; 15 Am. L. Rev. 231. Wharton says that the better opinion is that where the action is for non-delivery, the sender only can maintain the action. Our cases of *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53, *Western Union Tel. Co.* v. *Hopkins*, 49 Ind. 223, and *Western Union Tel. Co.* v. *Fenton*, 52 Ind. 1, were actions for damages based upon a statutory provision entirely different from that which gives the right to recover a penalty, and can not be deemed in conflict with the decisions declaring the right of action for the penalty to be in the sender of the message. It is our settled conviction that our cases decide, and rightly decide, that the right to recover the penalty is in the sender of the message.

The statute operates in favor of the sender of a message delivered at an office in this State, and upon a corporation represented within our borders by its agents and officers. The parties are, therefore, within our jurisdiction. The duty which the statute assumes to enforce is one arising in Indiana, for it grows out of and is founded upon an undertaking entered into in this State. The parties and subject-matter being within our jurisdiction, they are subject to our laws. Persons and property within the jurisdiction of a State are subject to the laws of that State.

The duty which the statute seeks to enforce is owing here in Indiana and not elsewhere; it was here that the contract was made which imposed the duty on the telegraph company, and it was here that the failure occurred, for the message was not transmitted, as the law commands, in good faith and with diligence and impartiality. The duty which the company failed to perform was not a duty owing in Iowa, but was a duty owing in Indiana, where the parties executed the contract out of which the duty arose. The duty of the com-

pany did not end at the State line; it extended throughout the whole scope of the undertaking, and required the message to be transmitted and delivered, in good faith and with reasonable diligence, to the person to whom it was sent. The breach of duty, no matter where the specific act constituting it occurred, was a breach here and not elsewhere. The duty is a general and continuous one, and, if not performed, the failure to perform, irrespective of the place where the failure occurred, is a breach of the duty at the place of its creation. There is not the slightest resemblance between such a case as this and cases of distinct and independent wrongs occurring wholly beyond the limits of the State; nor is there the remotest analogy between such a case as the present and the case of an attempt to enforce in one jurisdiction the laws of another State or Nation. There is here no attempt to enforce the law of another State, nor to enforce a penalty for a breach of a duty created by a foreign statute. The action is in an Indiana forum to enforce a duty created by an Indiana statute, and arising out of an Indiana contract made by parties within the State. We see no reason to depart from the rule laid down in the cases of *Western Union Tel. Co.* v. *Hamilton*, *supra*, *Western Union Tel. Co.* v. *Lindley*, *supra*, and *Carnahan* v. *Western Union, T. Co.*, *supra*, and we not only refuse to overrule them, but expressly and fully approve them. In holding, as we do, that our statute may be enforced, although the undertaking is to transmit the message beyond the State, we do not trench upon the doctrine that State laws have no extra-territorial effect. What we hold is that the statute operates upon the parties and the subject-matter within our jurisdiction by enforcing the performance of a duty created here, owing here, and violated here.

If a telegraph company should show a positive statute of another State commanding the delivery of messages in a certain manner, and different from that prescribed by our statute, then, it would, perhaps, be true that the company would make out a perfect defence by showing obedience to its com-

mands. In such a case the defence would not be good for the reason that our statute is bad, but because of the rule that necessity is always an excuse, and a positive law enjoining a duty creates a necessity. However this may be, the defence in this case is not valid for the reason that there is nothing in the Iowa statute which contravenes or impairs the statute of Indiana.

We have decided many times, as has been already shown, that our statute gives the right of action for the penalty to the sender of the message, and he can, of course, recover no other penalty than that prescribed by our statute. If the company should wrongfully violate the law of some other State, and be punished by the courts of that State, the punishment would not be for a violation of our law, but would be for a wrong committed against the law of another jurisdiction, so that it is impossible that the punishment should be for one and the same offence.

Our statute does not give the right to the penalty because a specific act of negligence is committed, but gives the penalty to secure the performance of a duty which springs into existence when the contract is made. It is the breach of duty that is punishable, and not the particular act which constitutes the breach. Wherever the act which constitutes the breach of duty is committed, whether here or in a foreign jurisdiction, the duty is broken here, where it came into being and where it was owing and should be discharged. A confusion of thought leads to a wrong conclusion, but this is cleared away when it is brought fully into view that the wrong consists in the violation of duty, and that this violation takes place where the duty exists, and where the one party owes it and the other has a right to demand that it be neither violated nor omitted. There is no conflict of law and no clashing of jurisdiction, for where the duty is owing there it is violated by an act which constitutes a breach. Mr. Thompson says: "In an action to recover the statutory penalty for failure to transmit a message from an office in one State to

an office in another State, the fact that the act of negligence which prevented the message from reaching its destination occurred out of the former will not defeat a recovery in that State." 2 Thomp. Neg. 838. Judgment affirmed.

Filed April 4, 1884.

No. 11,587.

THE STATE *v.* SAMMONS.

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CRIMINAL LAW.—*Indictment.*—*Time.*—Under section 1756, R. S. 1881, an indictment is not bad for failure to state a time at which the offence was committed, unless time be of the essence of the offence.

From the Newton Circuit Court.

F. T. Hord, Attorney General, *M. H. Walker*, Prosecuting Attorney, and *I. H. Phares*, for the State.

ZOLLARS, J.—An indictment was returned against appellee, which charges him with having sold intoxicating liquors in less quantities than a quart, without a license. The indictment was quashed; the State appeals. The portion of the indictment which charges the time of the sale is as follows: "That one Nicholas Sammons, late of said county, on the 15th day of March, A. D. 188–, at said county," etc. It will be noticed that while the day and month are stated, the year is not stated, unless it be the year, A. D. 188.

We are not favored with a brief on behalf of appellee, nor have counsel for the State rendered us any assistance, except to call our attention to the statutes.

Their contention is that, in cases of this character, under our present statutes, an indictment will not be bad because of a failure to state a time when the offence was committed, nor because of an imperfect statement of such time. The general rule has been, that the indictment should charge a day, month and year, as the time when the crime was committed,

and that in the absence of such charge the indictment will be ill.

This is the rule as we received it from the mother country, and as it has been generally adopted and practiced in the States.

Where time is not of the essence of the offence, it has not been the rule to require proof of the time as charged. In such cases, the time is one of the least important elements necessary to a conviction, and hence it is sufficient to show that the crime was committed before the return of the indictment, and within the period fixed by the statute of limitations, where such limits are fixed. Time is thus more a matter of form in pleading, than of substance.

Mr. Bishop, in his Criminal Procedure, Vol. 1 (2d ed.), sec. 386, says: "The averment of *time* is altogether formal, since it is unnecessary to prove the offence to have been committed at the time alleged in the indictment, unless some time be limited for the prosecution, or time itself be material to the constitution of the offence. These averments, therefore, convey, in general, little information either to the defendant or his judges. It is, nevertheless, a general rule, that the time and place of every material fact must be plainly and consistently alleged; and such a degree of precision does the law exact in this respect, that any uncertainty or incongruity in the description of time and place will vitiate the indictment."

Many of the reasons which led to strictness in criminal pleading and practice have ceased to exist in the changed order of things, and the tendency of the courts and legislatures has been to liberalize, and adopt a less strict and formal procedure, keeping in view, of course, the protection of society, and the safety and liberty of the citizen. With this idea in view, the Legislature passed an act with reference to criminal pleading and practice, one section of which provides as follows: "The precise time of the commission of an offence need not be stated in the indictment or information; but it is sufficient if shown to have been within the statute of limita-

tions, except where the time is an indispensable ingredient in the offence." 2 R. S. 1876, 384, section 56.

This section, it will be observed, does not dispense with the statement of a time, but only with the precise time of the commission of the offence charged. It is really an enactment into a law of what was the rule before. *Hampton* v. *State*, 8 Ind. 336; *Clark* v. *State*, 34 Ind. 436.

In the case last cited, it was held that the day, month, and year should be stated. Mr. Justice WORDEN, in speaking of the above statute, said: "The effect of the statute is the same as if it read as follows: 'The real time of the commission of an offence need not be stated in the indictment; but it is sufficient if shown *by the proof* to have been within the statute of limitation, except,'" etc. Subsequent rulings are in harmony with this. The statute, with some enlargement, has been carried into the revision as section 1738, R. S. 1881.

Others of the States have adopted similar statutes. The courts of some of those States have held that, notwithstanding the statutes, a day, month and year must be stated in charging an offence; and others, that it is sufficient to state the year only, or make the general charge in the words of the statute, that the offence was committed before the return of the indictment. *King* v. *State*, 3 Heisk. (Tenn.) 148; *People* v. *Kelly*, 6 Cal. 210; *Cokely* v. *State*, 4 Ia. 477; *Stevenson* v. *State*, 5 Baxter (Tenn.) 681; *State* v. *Gibbs*, 6 Baxter (Tenn.) 238; *State* v. *Parker*, 5 Lea (Tenn.) 568.

It will be noticed that the section of the statute, above set out, makes an exception when the time is "an indispensable ingredient in the offence." When such is the case, the strictness of the old rules of pleading is not relaxed by that section. But, even as to such cases, the strictness of the old rules is relaxed by the subsequent section 61, 2 R. S. 1876, p. 386, in which it was provided that no indictment shall be quashed for the want of an allegation of the time and place of any material fact, when the venue and time have once been stated in the indictment or information. Thus the law stood until

the revision of 1881, when the above provision was enlarged and carried into it, and another added, upon which counsel for the State rely, and which presents the real question for decision. Section 1756, R. S. 1881, provides as follows: "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * * *

"*Eighth.* For omitting to state the time at which the offence was committed in any case in which time is not the essence of the offence; nor for stating the time imperfectly, unless time is of the essence of the offence."

In the time we have been able to give to the investigation we have found no statutes, elsewhere, so broad and comprehensive as this, except section 24 of Ch. 100 of 14 and 15 Vict., set out in 1 Archbold's Criminal Practice and Pleading, p. 260, and the statute of Missouri.

We have found no direct adjudication upon the English statute. Its terms are so comprehensive that there seems to be not much room for construction. It is said by an English writer, in speaking of this statute: "It was usual to state the time when the offence was committed; but now the omission of the statement of time at which the offence was committed, in any case where time is not of the essence of the offence, * * is immaterial." Dearsly Criminal Process, p. 22.

In the case of *State* v. *Stumbo*, 26 Mo. 306, it is said: "The only objection to the indictment is that it omits to state the year in which the offence was committed. This objection is disposed of by the 27th section of article 4 of the act regulating proceedings in criminal cases, (R. C. 1855, p. 1176,) which declares that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, 'for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence.'"

In the case of *State* v. *Wilcoxen*, 38 Mo. 370, no time

was stated in the indictment on which the offence was committed. It was held that the objection was disposed of by the statute. These cases are authority for the construction of our statute, section 1756, if authority be needed.

It can not be said that "the time," as used in this section, has relation to, or means the exact time of, the commission of the offence, as was held in construing section 56 (section 1738, R. S. 1881), *supra*. Here "*the* time" is the same as *a* time. On a motion to quash, the time stated in the indictment is taken as the correct time of the commission of the offence, whether it in fact be so or not. On such a motion the facts stated are admitted to be true, as in the case of a demurrer to a complaint in a civil action. Aside from this rule of practice, there is no way of knowing whether or not the time stated is the correct time, until the evidence shall have been heard.

Any time stated in the indictment will be sufficient as against a motion to quash, if within the statute of limitations. It would be impossible, therefore, to make any question as to the sufficiency of the indictment on a motion to quash, because the correct time is not stated. If no time at all is stated, the question will be raised by a motion to quash. The statute declares that the indictment shall not be quashed because of a failure of a statement as to time. In order to have any intelligent signification in its application to the subject-matter, the section must be construed as providing that no indictment shall be quashed for omitting to state *a* time at which the offence was committed. And thus, in cases where time is not of the essence of the offence, a defendant may be put upon trial without any statement in the indictment of the time when the offence with which he is charged was committed. This is a very radical departure from the settled idea of criminal pleading and practice.

Ordinarily, it will not be a matter of much importance or inconvenience to defendants. As the prosecutor in such cases is not bound by the statement of a time in an indictment, it is

not of much consequence to the defendant, whether or not any time is stated. In cases where there is a limit fixed by statute, within which a prosecution may be commenced, it would be more convenient for the defendant to be apprised, by the statements in the indictment, of the time at which the crime charged was committed. If, by such statement, the offence should be shown to have been committed at a time without that fixed by the statutes of limitations, he might successfully move to quash the indictment. *State* v. *Rust*, 8 Blackf. 195; *Ulmer* v. *State*, 14 Ind. 52; *Hutchinson* v. *State*, 62 Ind. 556. He might thus be saved the trouble and expense of a long litigation, as might also the State.

On the other hand, the defendant is presumed to know of the statutes of limitations, and that he may avail himself of the protection they afford, under his plea of not guilty. *Hatwood* v. *State*, 18 Ind. 492; *Buckner* v. *State*, 56 Ind. 207; *Dickinson* v. *State*, 70 Ind. 247; *Baker* v. *State*, 34 Ind. 104.

The rule has been almost universal in the States, that where there are statutes of limitations, fixing a time within which prosecutions may be commenced, a statement of time should be made in the indictment, so that it may be known whether or not the prosecution is barred. The limit thus fixed has not been held to be of the essence of the offence, but it has been held to be so material, and of so much importance, as to require a specific statement of time in the indictment, even under statutes providing that no time need be stated, except that the offence was committed before the return of the indictment.

The California statute is that the precise time at which the offence was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding of the same, except when it is a material ingredient of the offence. In deciding a case in which this statute was urged, the Supreme Court of that State said: "The object of pleading is to apprise a party of the precise charge made against him, and to enable him to defend him-

self and to avail himself of all his legal rights and privileges. It is generally true that every essential fact must be stated in the indictment; and this means every fact material to the offence of which the party may be convicted; and the allegation of a day within the period of limitation is material, whenever the offence is subject to limitation." *People* v. *Miller*, 12 Cal. 291. See also *People* v. *Kelly*, 6 Cal. 210; *King* v. *State*, 3 Heisk. (Tenn.) 148. Under the English statute, it seems to be usual to state a day and year on which the offence was committed. 6 Cox Criminal Cases, appendix, pp. 3 and 98.

While we hold, then, that under our statute, above set out, it is not necessary in a case like this to state a time at which the crime was committed, time not being of the essence of the offence, we do not feel like encouraging such omission in the practice. It is a very easy matter to state a time at which the offence was committed. On the other hand, it is not so easy to determine in each case whether or not time is of the essence of the offence, or, as stated in section 1738, *supra*, an indispensable ingredient of the offence. See *State* v. *Wise*, 66 N. C. 120.

In the indictment under consideration, it may be said with propriety, that the statement in relation to the time is equivalent to no statement at all, or is a "stating of the time imperfectly." If it be said that the offence is charged as of the year A. D. 188, we know, of course, that neither the State nor the defendant had an existence at that time. See *Serpentine* v. *State*, 1 How. (Miss.) 256.

It is apparent, however, that the statement is an imperfect statement. The figures, and the dash following, clearly indicate that an additional figure was, by oversight, omitted. It is a case, therefore, covered by the statute, and the motion to quash should have been overruled. For the error in sustaining the motion, the judgment is reversed, at the costs of appellee.

Filed April 22, 1884.

No. 11,311.

WESTERN UNION TELEGRAPH COMPANY *v.* MOSSLER.

TELEGRAPH COMPANIES.—*Complaint to Recover Penalty for Failure to Transmit Message.—Statute Construed.*—Section 4176, R. S. 1881, is penal and must be strictly construed, and in a suit before a justice of the peace to recover the penalty, the complaint must aver, and the evidence prove, that the sender of the message had paid of tendered the usual charges, at the time of sending it.

From the Marion Circuit Court.

J. E. McDonald, J. M. Butler and *A. L. Mason*, for appellant.

G. Carter and *J. N. Binford*, for appellee.

HAMMOND, J.—This was an action, commenced before a justice of the peace by the appellee, to recover the statutory penalty of one hundred dollars for delay in transmitting a message.

The appellee sent the dispatch in question, on September 7th, 1882, from the appellant's office in Indianapolis, to M. L. Jackson, at Lebanon, Indiana. The message, as received by the appellant's agent at Lebanon, was to "M. L. Jacks," the error in the name occurring by some means in the transmission. The appellee, on the evening of the same day, sent another message to Jackson, from which the agent at Lebanon became apprised of the error in the first dispatch and informed for whom it was intended. Both telegrams were delivered to Jackson on the following morning.

The trials before the justice and in the court below, to which an appeal was taken, resulted in favor of the appellee. Judgment was rendered in the circuit court on the finding, over the appellant's motion for a new trial and exceptions. It is assigned for error in this court that the appellee's complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling the appellant's motion for a new trial. The case was tried upon an agreed statement of facts. These, we think, were sufficient

to authorize a recovery in favor of the appellee except in one particular. As presenting this point we make the following extracts from the statement referred to:

"Said plaintiff, Mossler, suffered no actual damages whatever by reason of the error in the transmission of said message set forth in Exhibit B" (the message about which suit is brought), "and never paid or tendered to defendant any money whatever for any or either of the messages in this agreement mentioned and set forth; * * that defendant did not demand pay in advance for sending said message, Exhibit B, but entered in writing thereon the word 'collect;' that message, Exhibit B, was sent as an answer to message Exhibit A" (which was from Jackson to the appellee); "that it was the custom of the defendant when sending a message as an answer to a previous message, which requested an answer, to send the answer without demanding pay therefor in advance, but entering on said message the word 'collect;' thereby intending to collect the charges for transmitting the same of and from the person to whom the same is sent, as an answer, upon delivery of the same to him, and that it was the custom of defendant upon default of the said receiver paying therefor, to demand pay from the sender thereof, and that no demand on plaintiff has been made for said message, Exhibit B; that the plaintiff at the time was aware of said custom when he sent said message, Exhibit B, and knew the rules and regulations of the defendant regarding the transmission of messages."

The complaint also avers that the appellee did not pay the charge for transmitting the message, but that it was the understanding that he would pay the same on demand, if not paid by Jackson on its delivery to him. The statute (section 4176, R. S. 1881), upon which the appellee's action is predicated, is as follows:

"Every electric telegraph company with a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive

dispatches, whether from other telegraphic lines or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: *Provided, however*, That arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest out of its order, and that communications for and from offices of justice shall take precedence of all others."

The letter of the statute requires the sender of a dispatch to pay or tender the usual charges, according to the regulations of the company, and unless this is done we think that he can not recover the statutory penalty for failure or postponement in the transmission of his message. The regulations mentioned are those which the company may make for the payment of dispatches by the senders thereof. They do not relate to regulations which may be made relieving the sender from payment unless the receiver refuses to pay on delivery of the message to him. From the facts stated, it would seem that the appellee, by the regulations of the company, had the election to pay in advance or to be responsible for payment in case of Jackson's refusal. The former method would have brought his case within the statute, and entitled him to the penalty for the appellant's failure or delay in the transmission of his message. But he accepted the company's waiver of payment in advance, and thereby waived the statutory penalty.

The law is familiar that penal statutes must be strictly construed. 1 Bl. Com. 88; Smith Com. 854; Sedgwick Stat. Law 279; Sco. & Tel., section 432.

In *Western Union Tel. Co.* v. *Axtell*, 69 Ind. 199, it was held that the averment in the complaint, that the defendant "was 'engaged in the business of transmitting telegraphic mes-

sages for hire,'" was insufficient as not being equivalent to an averment that the defendant was "engaged in telegraphing for the public," as required by the statute. It was said in that case: "A statute so highly penal must be construed strictly. The party claiming under it must bring his case clearly within the letter and spirit of the act. Keeping in mind the main purpose of the statute, its highly penal nature, and the rule of strict construction, we can not hold that the words 'engaged in the business of transmitting telegraphic messages for hire' are equivalent to the words 'engaged in telegraphing for the public.' * * * A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the letter and the necessary meaning of the act creating it."

In *Rogers* v. *Western Union Tel. Co.*, 78 Ind. 169 (41 Am. R. 558), this court said: "The statute is a highly penal one, and we can not extend its operation by a liberal construction." See, also, *Western Union Tel. Co.* v. *Ferguson*, 57 Ind. 495, in which it was said: "Under the provisions of the statute, * * * which provides a penalty for a failure to transmit a telegraphic message, it is not every telegraph company which is subjected to such penalty for such failure, but it is the telegraph company which has 'a line of wires wholly or partly in this State,' and which is 'engaged in telegraphing for the public,' that is made amenable to the penalty prescribed by our statute for the failure to transmit a message, 'on payment or tender of the usual charge.'"

We adhere to the rule of construction announced in *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181, *Western Union Tel. Co.* v. *Gougar*, 84 Ind. 176, and *Western Union Tel. Co.* v. *Roberts*, 87 Ind. 377, that the statute must have such a reasonable construction as will not defeat the plain intention of the Legislature. In each of the above cases, the facts brought the plaintiff's cause of action plainly within the letter of the statute. In such case, hypercritical construction is not to be resorted to for the purpose of defeating the object of the

enactment. But where the plaintiff's case is not plainly brought within the letter of the statute, its provisions must not be enlarged by construction so as to embrace such case. To authorize a recovery in a case like the present, the complaint must aver, and the evidence must show, in addition to other necessary facts, that the plaintiff paid or tendered the company's charges for transmitting the message, at the time of sending it.

The application of the decision in this case is intended to be limited to actions to recover the statutory penalty.

The same particularity of pleading in civil actions before justices of the peace is not required as in the higher courts. Ordinarily, a complaint before a justice will be sufficient if it apprises the defendant of the plaintiff's demand, and if it will bar another action for the same cause. But where, as in the present case, the complaint shows affirmatively on its face that the plaintiff has no cause of action, the rule does not apply, and the complaint will be held bad, though attacked for the first time in this court. The appellee's complaint stated no cause of action, and the finding of the court was not sustained by sufficient evidence.

Judgment reversed, with costs, with instructions to the court below to sustain the appellant's motion for a new trial, and to dismiss the appellee's case unless he amends his complaint so as to state a good cause of action.

Filed April 26, 1884.

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No. 11,260.

RICE, AUDITOR OF STATE, *v.* THE STATE, EX REL. DRAPIER.

AUDITOR OF STATE.—*Duty to Draw Warrants.—Mandate.*—When the amount of a claim against the State has been ascertained as prescribed by law, and money in the treasury has been appropriated to pay it, the auditor of State may be compelled by mandate to draw a warrant therefor, but not otherwise.

Rice, Auditor of State, *v.* State, *ex rel.* Drapier.

SAME.—*Legislative Appropriation.—Brevier Reports.*—The act of January 9th, 1883, making an appropriation to pay the expenses of the 53d General Assembly, did not appropriate any money to the payment of expenses of any former General Assembly, nor could payment for Brevier Reports of proceedings and debates of that General Assembly be made out of said appropriation, in the absence of a definite allowance therefor made by the concurrent action of the two houses, which was not done.

SAME.—*Legislative Power.—Separate and Concurrent Resolutions of Each Branch of General Assembly.*—Separate resolutions of each house, authorizing payment for Brevier Reports, could not amend or vary the provisions of the statute, which required concurrent action of the two houses.

From the Marion Circuit Court.

F. T. Hord, Attorney General, for appellant.

O. M. Wilson, for appellee.

NIBLACK, J.—Complaint by William H. Drapier as relator, styling himself plaintiff, against James H. Rice, auditor of State, for a mandate, in two paragraphs.

The first paragraph charged that on the 9th day of January, A. D. 1883, the General Assembly of the State of Indiana appropriated for legislative expenses the sum of $125,000, by an act entitled "An act appropriating $125,000 to defray the expenses of the regular session of the Fifty-Third General Assembly of the State of Indiana, and other matters connected therewith, and declaring an emergency," approved January 9th, 1883; that at the beginning of said session, by reason of said appropriation to the respective houses thereof, the House of Representatives and Senate of said Assembly, and agreeably to the usage and practice heretofore observed by preceding Assemblies of said State, and of the orders and allowances heretofore made by the respective houses in that behalf, and for the better preservation of, and to secure greater accuracy in, the reports of debates, votes and proceedings thereof, it became and was necessary to employ some suitable, competent and skilled person to faithfully and accurately report said proceedings, and reduce the same to writing in proper form for the use of said Senate and House, and the information and benefit of the citizens of the State; that in obedience

to this usage and practice plaintiff was authorized, employed and permitted by said Senate, as well as said House, the privileges of the floors thereof, whereby he should so report said debates, votes and proceedings thereof, and reduce the same to writing; that in and during the whole time of said session of said Assembly, plaintiff was so recognized by said Senate and House as the stenographic Assembly reporter, and as such, by their sanction and direction, did make, prepare and publish, and did cause to be made, prepared and published, for the Senate and House, and such use as they might see proper to make thereof, said debates, votes, reports and proceedings thereof, and did print, publish and bind the same in the ascertained form and style of the "Brevier Legislative Reports," of the Fifty-Third General Assembly of the State of Indiana, being volume twenty-one; that in pursuance of said employment said services became and were a legislative expense, and in consideration of said services so rendered, and to obtain and secure copies of said reports of their proceedings, the Senate did, on the 5th day of March, A. D. 1883, being a legislative day, allow and direct to be paid to said plaintiff the sum of two-thirds of a cent per page per copy for said Brevier Legislative Reports, so made and published by plaintiff, of said proceedings, votes and debates, and for payment therefor at the same time passed a resolution, in the words and figures following:

"*Resolved*, That the auditor of state be and is hereby directed to issue his warrant on the State treasury, at the end of the present session, in favor of W. H. Drapier, stenographic Assembly reporter, for what may be due him for the Brevier Legislative Reports, at the same price paid per page per copy as uniformly paid since 1857, to be paid out of the funds appropriated for legislative expenses; the number of copies for the current session to be the same as heretofore published, ten copies of each to be forwarded, as soon as published, to each member of the General Assembly."

That on the same day, by reason of said action of the Sen-

ate granting unto plaintiff, as the stenographic Assembly reporter, an order for the payment of said reports, and because of said reports being made and published, and containing likewise the debates, votes, reports and proceedings of the House of Representatives during and for said session, and to procure the same upon their own order, the said House accepted said official reports, and passed the following order in relation thereto:

"By Mr. Mosier—*Mr. Speaker:* I move that the secretary of State is hereby directed to send to each member of this House, officers and clerks thereof, five copies of the Brevier Reports, and each of the House and Senate Journals, as soon as they are printed and bound, and the Acts of the present session, and the motion was adopted by the House."

That the plaintiff caused said Brevier Legislative Reports to be printed and bound, and to be accordingly deposited with the secretary of state for distribution, as more particularly is shown by the certificate hereto attached, and made part hereof; that, by reason of the premises, the State of Indiana, by her Legislature, became and is indebted to plaintiff in the sum of $3,797.26, for said Brevier Legislative Reports so taken, made and published by plaintiff, at and during the regular session of said Fifty-Third General Assembly of the State of Indiana, as more fully appears by said account filed herewith and also made part hereof.

Whereby and by means whereof plaintiff became and was entitled to receive from the State of Indiana the sum of $3,797.26, for the payment of which there is money in the State treasury belonging to the fund upon which said order is made, and upon which the defendant should draw his warrant in favor of plaintiff for said amount; that, in obedience to the authority and direction in said resolution contained, it became and was the duty of defendant, auditor of state, upon the presentation thereof, together with the verified account of plaintiff for the amount then and there shown to be due him for said reports of the regular session of the Fifty-Third General Assembly of the State of Indiana, to draw his war-

rant in favor of plaintiff on said fund on the treasurer of state for the amount so then and there found to be due him, which said auditor of state was so requested to do; and upon said account, duly acknowledged and verified, said plaintiff did then and there, on the 1st day of August, 1883, demand of the defendant Rice, auditor of state, at the office of the auditor of state in the city of Indianapolis, that he draw his warrant as such auditor of state in favor of the plaintiff on the treasurer of state for the said sum of $3,797.26, due and owing and payable to him out of the State treasury by said act, approved January 9th, 1883; that said Rice, as such auditor of state, utterly refused to issue or draw said warrant, and still withholds compliance with said demand although there is money in said treasury especially appropriated to pay the same; that no cause or facts exist to constitute an excuse for said refusal, and plaintiff without this has no other adequate and specific remedy by way of action or distress for the recovery of said money. Wherefore plaintiff prayed that a writ of mandate be issued to said Rice, as such auditor of state, commanding him to draw a warrant upon the treasurer of state in favor of the plaintiff for the sum of $3,797.26.

The account accompanying this paragraph of the complaint was as follows:

"THE STATE OF INDIANA, *Dr.*,

To W. H. DRAPIER, *Stenographic Assembly Reporter:*

For 1,750 copies of the Brevier Legislative Reports of the debates and proceedings of the regular session of the Fifty-Third General Assembly of the State, volume 21, at the price uniformly paid heretofore by the State, two-thirds of a cent per page per copy, 316 pages, in compliance with Senate and House resolutions, both passed March 5th, 1883	$3,686 66
For interest on above, six months, at six per cent.	110 60
"Total	$3,797 26"

The second paragraph of the complaint charged that there was due and owing to the plaintiff by the State, on account of like services herein set forth and rendered in same manner and form, in and for the Fifty-First and Fifty-Second General Assemblies of the State of Indiana, the additional sum of $11,656.23, as more fully appears by the account and full statement thereof hereto attached and made part hereof; that said services were rendered at the instance and request, and with the full knowledge of the respective houses of said Assemblies—a printed copy of proceedings and index being placed every week and part daily upon the desk of each member thereof by plaintiff. A copy of such printed circular is hereto attached, whereby and by means whereof the debates, votes and proceedings of said Assemblies might be accurately taken and perfected, and were better preserved for the use of said Senate and House and Assemblies; that said Fifty-First and Fifty-Second General Assemblies of the State of Indiana gave to said plaintiff the privileges of the floor in their respective houses thereof for the purpose of reporting the debates and proceedings thereof, and with the sanction and under the direction of each of said houses, to wit: the Senate and House of Representatives. He then and there made and published, and caused to be made and published, volumes seventeen, eighteen, nineteen and twenty of said Brevier Legislative Reports, containing the debates, votes and proceedings thereof as they daily occurred; and in consideration of said services, and to procure copies of reports connecting therewith, the Senate of said Fifty-First General Assembly directed the secretary of state to place the said Brevier Legislative Reports of former Assemblies on the desks of members thereof, as more fully appears by resolution in the words and figures following, to wit:

"*Resolved,* That the secretary of state be requested to lay on the desk of Senators one copy each of the Brevier Legislative Reports belonging to the State, now in the document room in the basement of the State building."

Which was accordingly done; that during the session of the Fifty-Second General Assembly of the State of Indiana, in 1881, the Senate authorized said plaintiff to continue as such reporter, and to take, make and publish the debates, votes and proceedings thereof, as appears by a resolution in the words and figures following:

"*Resolved*, That W. H. Drapier is authorized to continue the Brevier Legislative Reports at the same price and the same number of copies furnished by him to every General Assembly since 1857, for seventeen years: *Provided*, Such reports shall not exceed 750 in number."

That in accordance with said authority to furnish the same number of copies as heretofore, said plaintiff made, printed and published said debates, votes and proceedings as heretofore, for the use of said Fifty-Second General Assembly, and by virtue of an understanding had by plaintiff with the secretary of state, a copy of which is filed herewith and also made part hereof, plaintiff distributed to the members of said Assembly the usual number of said Brevier Legislative Reports so made and published; that in pursuance of the authority, privilege and direction received and given him by the respective houses of the Fifty-First and Fifty-Second General Assemblies of the State of Indiana, plaintiff did perform the duties required therein of him in this behalf as such stenographic Assembly reporter, and did make, print and publish, in manner and form as aforesaid, said debates, notes and proceedings of said Fifty-First and Fifty-Second General Assemblies of the State of Indiana; that the Senate and House respectively of the Fifty-First, Fifty-Second and Fifty-Third General Assemblies possessed all powers necessary for a branch of the legislative department of government of the State of Indiana, and as such the said Senate that convened in regular session January 4, 1883, in the Fifty-Third General Assembly, did constitute the half of and a continuing part of the same, and like Senate of the Fifty-Second General Assembly that convened January 6, 1881, and with like power

thereof, that said Fifty-Second General Assembly authorized and received, each member thereof, to wit, 150, seventeen hundred and twenty-seven copies of said Brevier Legislative Reports, and that said Senate of the Fifty-Second General Assembly likewise was and constituted a part of the legislative department of said State in the Fifty-First General Assembly, wherein and by the Houses thereof plaintiff was likewise employed and authorized by the sanction and direction of said Senate and House thereof, and by each severally as co-ordinate branches of government of said State, to report, make, print and publish the debates, votes and proceedings of the same, and which the said Senate and House of said Fifty-First Assembly did then and there order and receive seventeen hundred and twenty-eight copies of said Brevier Legislative Reports containing their said proceedings; that said services were rendered and reports furnished as aforesaid, and became and were a legislative expense of and owing by the State of Indiana, accruing to said State at each session as aforesaid, and the same became a debt, to be paid out of moneys appropriated for legislative purposes by her Legislature or co-ordinate branches thereof; that no allowance has heretofore been made plaintiff for the payment thereof; that in pursuance of the order contained in the aforesaid resolution of the Senate, as a co-ordinate branch of the government of the Fifty-Third General Assembly, and fully empowered so to act, full compensation was allowed plaintiff for said Brevier Legislative Reports of the Fifty-First and Fifty-Second General Assemblies, and the auditor of state was therein directed to draw his warrant at the end of the present session—meaning the regular session of the said Fifty-Third General Assembly—in favor of W. H. Drapier, stenographic Assembly reporter, for what may be due him for said Brevier Legislative Reports, for the payment of which there is money in the treasury upon which said warrant may be drawn; that in obedience to the authority and direction in said resolution contained, it became and was the duty of defendant, auditor

of state, upon the presentation of the account, when ascertained and properly acknowledged and verified under oath, for said Brevier Legislative Reports of and for the said Fifty-First and Fifty-Second General Assemblies of the State of Indiana, to draw his warrant on the treasurer of state in favor of plaintiff for the amount so then and there found due and owing plaintiff for making, printing and publishing said debates, votes and proceedings of the Fifty-First General Assembly and the Fifty-Second General Assembly respectively, as by said account is shown; and said plaintiff did then and there, on the 1st day of August, 1883, demand of the defendant, as auditor of state, at the office of the auditor of state in the city of Indianapolis, that he draw a warrant, as such auditor, on the treasurer of state in his favor for the further sum of $11,656.23, so due and owing him, in pursuance of the act appropriating money for legislative purposes, approved January 9th, 1883; and of the resolution of the Senate, adopted March 5, 1883; that the said Rice, as such auditor, utterly refused to issue a warrant as requested for said sum of money, or any other sum on account of said Brevier Legislative Reports. Wherefore the plaintiff prayed that a mandate might also be issued to the said Rice, as such auditor of state, commanding him to draw his warrant on the treasurer of state in favor of the plaintiff for said sum of $11,656.23.

The account which accompanied this second paragraph of complaint was as follows:

"THE STATE OF INDIANA, *Dr.*,

To W. H. DRAPIER, *Stenographic Assembly Reporter:*

For 1,728 copies of the Brevier Legislative Reports of the debates and proceedings of the regular session of the Fifty-First General Assembly of the State, volume 17, at the price uniformly paid heretofore by the State, two-thirds of a cent per page

per copy, 252 pages, in compliance with a Senate resolution passed April 16th, 1881, and a Senate and a House resolution passed March 5th, 1883		$2,903 04
Do. do. special session, volume 18, 160 pages		1,221 12
For interest on above, fifty-four months, at six per cent.		1,113 52
Binding 189 copies for members and officers	$28 35	
Interest fifty-four months at six per cent.	7 65	36 00
Total		$5,273 68
For 1,727 copies of the Brevier Legislative Reports, regular session of Fifty-Second General Assembly, volume 19, 290 pages, in compliance with the three resolutions above referred to	$3,338 86⅔	
Do. do. special session, volume 20, 182 pages	2,095 42⅔	
For interest on above, thirty months, at six per cent.	815 14	6,249 43
Rebinding 200 copies of volumes 17, 18, 19 and 20 (covers destroyed by a flood)		20 00
Paid United States, American and Adams Express Companies for expressing books to members—6,910 volumes	50 00	
Interest twenty-four months	6 00	56 00
Total		$6,382 50
"Grand Total		$11,656 23"

Rice, Auditor of State, *v.* State, *ex rel.* Drapier.

An alternative writ of mandate based upon both paragraphs of the complaint was issued.

The defendant, appearing to the action, moved to quash the alternative writ, upon the ground, among others, that the facts charged in the complaint were insufficient to constitute a cause of action against him, but the motion was overruled. A demurrer being also overruled, the defendant made a return to the writ consisting of ten paragraphs, or separate and distinct specifications of defence. Demurrers were sustained to the first, second, fourth, fifth, sixth, seventh, eighth and ninth of these paragraphs, and, issue being joined upon the remaining paragraphs, the circuit court proceeded to hear the evidence, and made a finding that there was due to the plaintiff for Brevier Legislative Reports furnished to the General Assembly of this State at different times, as follows: For the Fifty-Third General Assembly, the sum of $3,600; for the regular session of the Fifty-Second General Assembly, the sum of $3,338.86; for the special session of that General Assembly, the sum of $2,095.42; for the regular session of the Fifty-First General Assembly, the sum of $2,903.04; for the special session of that General Assembly, the sum of $1,221.12; making in all the sum of $13,198.44. The circuit court thereupon rendered a judgment of recovery against the defendant, as auditor of state, for the several sums of money found to be due to the plaintiff as above, both in detail and in the aggregate, and for costs of suit, concluding with an order that the defendant, as such auditor, should draw warrants upon the treasurer of state for said several sums of money so found to be due to the plaintiff.

The first error assigned upon the proceedings below is upon the refusal of the circuit court to quash the alternative writ of mandate. A motion to quash a writ of mandamus is in the nature of a demurrer, and in that way the question of the sufficiency of the facts relied on to sustain the writ may be raised. 5 Wait's Practice, 581; Wood Mandamus, 41; Moses

Mandamus, 202; Tapping Mandamus, 368; *People, ex rel.*, v. *College of Physicians and Surgeons*, 7 How. Pr. 290.

Whenever the money necessary to pay a particular claim against the State has been appropriated by the Legislature, and the amount of the claim has been definitely ascertained in a manner prescribed by law, a refusal by the auditor of state to draw his warrant upon the treasurer of state for the payment of the claim will authorize the interposition of the courts by appropriate mandatory proceedings. In such a case it is not a sufficient objection that such proceedings afford an indirect method of suing the State. In general, however, since a State can not be sued in its own courts without its own legally expressed consent, the remedy by mandamus is not to be extended so as to become in effect a process against the State for the establishment of demands of an unliquidated nature, which properly fall within the cognizance of the Legislature. High Extraordinary Legal Remedies, section 100, *et seq.*

Section 2052, R. S. 1881, makes it a misdemeanor for the auditor of state to draw a warrant on the treasurer of state when there is no money in the latter's hands properly applicable to the payment of the warrant.

Section 5611 of R. S. 1881 makes it the duty of the auditor of state to "Examine and liquidate the claims of all persons against the State in cases where provisions for the payment thereof shall have been made by law; and when no such provisions, or an insufficient one, has been made, to examine the claim, and report the facts, with his opinion thereon, to the Legislature."

Sections 5638 and 5639 still further prohibit the auditor of state from drawing his warrant upon the treasurer of state on account of any claim or demand, unless the money necessary for the payment of the warrant has been appropriated by law, and stands to the credit of the proper fund to be used in its payment. *State, ex rel.*, v. *Porter*, 89 Ind. 260.

It is conceded in argument that an appropriation by law,

in some form, is necessary for the payment of any claim against the State, and this action is prosecuted upon the theory that by the act of January 9th, 1883, appropriating money to pay the expenses of the Fifty-Third General Assembly of the State, made an appropriation out of which the several sums of money claimed to be due to Drapier may be lawfully paid.

The first section of the act of January 9th, 1883, thus referred to, appropriated the sum of $125,000 to defray the expenses of the General Assembly then in session, with a proviso that if any amount should remain after the expenses of that General Assembly were paid, the amount so remaining should at once revert to the general fund. The second section made it the duty of the auditor of state to audit the accounts and issue his warrants upon the treasurer of state for the per diem and mileage of senators and representatives as allowed by law, and also such additional allowances as might be provided by the concurrent action of both houses, upon the certificate, in case of senators, of the president of the Senate, and in the case of representatives, upon the certificate of the speaker of the House, setting forth the time served and the amount of the mileage and allowance to which such senators or representatives might be entitled.

The third section required the auditor of state to audit the accounts and issue his warrants upon the treasurer of state for the per diem of officers of the Senate and House of Representatives and their assistants and appointees, including clerks and assistants to committees and clerk of the State librarian appointed by authority of both Houses, the pay of officers and employees to be as then provided by law, or as might be otherwise fixed by that General Assembly.

A careful examination of the provisions of this act will disclose, that the amount of money appropriated by it was to be used exclusively in defrayal of the expenses of the General Assembly which enacted it and was to be applied, *First.* In payment of the per diem and mileage of senators and repre-

sentatives as allowed by law; *Secondly.* In payment of the per diem of the officers and employees of the Senate and House of Representatives, whether chosen or appointed by each House separately or by both houses jointly. Such per diem to be paid at the rates then prescribed by law or at such other rates as might thereafter be fixed by the General Assembly. *Thirdly.* In payment of such additional allowances as might be made by the concurrent action of both houses.

The methods by which, under our system of parliamentary law, a Legislature exercises its power and jurisdiction, each in a different way, are, *First.* By motion; *Second.* By resolution; *Third.* By concurrent resolution; *Fourth.* By joint resolution; *Fifth.* By bill. Of these methods the motion is the least comprehensive and involves the exercise of parliamentary power in its simplest form. It sets the body in motion and again dissolves it, and is auxiliary merely to the ordinary work of legislation.

The next in the ascending gradation of parliamentary methods is the *resolution*, which declares some purpose, expresses a will, or prescribes an order, or formulates a command of the legislative body, usually not incidental to the ordinary course of business. A resolution, as well as a motion, is obligatory only upon the house which adopts it, and in this respect is inferior in efficiency to both a concurrent and a joint resolution, each of which is, in its turn, less effective, as the expression of legislative will, than a bill where enacted into a law. *May* v. *Rice*, 91 Ind. 546.

The resolution of the Senate, ordering the auditor of state to draw his warrant in favor of Drapier, did not purport to be, and was not in fact, anything more than a simple resolution of that body. The order made by the House, on the motion of Mr. Mosier, for the distribution of a certain number of Brevier Reports, was in no sense a concurrence with the resolution of the Senate.

As has been seen, that motion made no reference to the resolution of the Senate, and had an essentially different ob-

ject in view. The action taken upon that motion was the expression of the will of the House, not only upon a different subject, but by a method unlike that adopted by the Senate. The two houses did not, therefore, by any concurrent action, order the allowance of Drapier's claim. Such concurrent action was an indispensable prerequisite to its payment out of the money appropriated by the act of January 9th, 1883, *supra*. Besides, much the greater part of the claim, as is apparent on the face of it, did not accrue under any order, either express or implied, of either house of the Fifty-Third General Assembly. All that part of the claim, which accrued in connection with previous General Assemblies, could not in any event have been properly certified to the auditor of state as expenses of the General Assembly which the money appropriated as above was set apart to pay. Considered in the most favorable light to Drapier, the complaint presents the case of an unliquidated and uncertified claim against the State, for the payment of which no provision has been made by law, and which can not consequently be paid without further legislation.

The act appropriating money for the expenses of the Legislature of 1883 clearly contemplated that all legislative expenses, other than per diem and mileage, should be first liquidated and then certified, before the auditor of state was required to draw his warrant. Conceding, therefore, that so much of the claim presented in this case, as accrued during the session of this last named Legislature, constituted legitimate legislative expenses, still no part of the claim can be paid out of the appropriation for the expenses of that session, for want of liquidation by the Legislature and the certificate of one or both of the presiding officers of the two houses. After all that has been said, a single proposition may seemingly be accepted as decisive of this cause, and that is, can a simple resolution of the Senate be made to amend, modify or vary the operation of a regularly enacted statute?

In the light of all that has preceded, and considered with

reference to the essential nature of legislative proceedings, the answer to that proposition must inevitably be in the negative.

The views we have expressed lead us to the conclusion that the circuit court erred in overruling the motion to quash the alternative writ of mandate, and that in consequence the subsequent proceedings in the cause can not be sustained.

The judgment of the circuit court is reversed, at the costs of Drapier, the relator, and the cause is remanded with instructions to sustain the motion to quash the alternative writ of mandate.

Filed March 12, 1884. Petition for a rehearing overruled April 23, 1884.

No. 10,926.

REYNOLDS *v.* LINARD.

PRACTICE.—*Dismissal.—Withdrawal of Evidence.*—When a complaint is in two paragraphs, the plaintiff may, upon the trial, dismiss as to one of the paragraphs, and withdraw all evidence which concerns only that paragraph, but he can not, without consent, withdraw any evidence which concerns the paragraph not dismissed.

WITNESS.—*Promissory Note.—Assignee of Administrator.*—In a suit against the maker upon a note lawfully sold by the administrator of the deceased payee to the plaintiff, the defendant is not a competent witness in his own behalf.

From the Marshall Circuit Court.

H. Corbin and *A. C. Capron*, for appellant.

F. Church, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant. The first paragraph of his complaint alleged that the defendant made a note for $125, payable to one Higday, which is due and unpaid; that Higday died the holder of the note, and his administrator sold it at public sale by order of the proper court to the plaintiff, and said sale was

confirmed by said court, whereby the plaintiff became the owner of the note. Wherefore, etc.

The second paragraph alleged that the defendant made a note without date on March 20th, 1870, for $261.78, payable ninety days after date to said Higday, which is due and unpaid; that Higday died the holder of it, and his administrator, under an order of the proper court, sold it at public auction to the plaintiff, who thereby became the owner of it. Wherefore, etc. Copies of the notes were made parts of the complaint.

The defendant pleaded as to the first note, except $58.25 thereof, payment and set-off, and offered to confess judgment for $58.25. As to the second note he pleaded a verified denial of the execution thereof. The plaintiff replied denying the entire answer. The court found for the plaintiff the amount of the first note and interest, overruled the defendant's motions for a new trial and in arrest of judgment, and rendered judgment on the finding. The defendant appealed. The errors assigned are:

1. Overruling the motion for a new trial.

2. Permitting the appellee to dismiss his second paragraph of complaint, and withdraw his evidence, while the appellant was introducing his evidence.

3. Permitting the appellee to introduce in evidence the petition and papers purporting to be records of the Laporte Circuit Court, without proper authentication or proof of their genuineness.

4. Refusing to permit the appellant to testify in his own behalf relative to the matter stated in his answer.

5. Overruling the motion in arrest of judgment.

Of these specifications of error the second, third and fourth relate to matters occurring upon the trial; they belong to the motion for a new trial, and can not be properly assigned as errors. Buskirk Prac. 114, 220.

The motion in arrest of judgment and the motion for a new trial present the only questions for consideration.

The appellant claims that the complaint was insufficient because there is no law which authorizes an administrator to sell the notes and accounts of his intestate at auction. He is mistaken in this; notes and accounts are personal property, and may be sold at auction. R. S. 1881, section 2275; *Weyer* v. *Second Nat'l Bank*, 57 Ind. 198; *Ramey* v. *McCain*, 51 Ind. 496; and see *Thomas* v. *Reister*, 3 Ind. 369; *Hamrick* v. *Craven*, 39 Ind. 241. An executor may sell such notes at public auction under the order of the court, or he may compromise desperate debts with the approbation of the court, or with such approbation he may file desperate claims in said court for the benefit of creditors, heirs and legatees. R. S. 1881, section 2302. There was no error in overruling the motion in arrest of judgment.

The reasons for a new trial are:

1. The finding was contrary to the evidence, and was not sustained by sufficient evidence.

2. The finding was contrary to law.

3. Error of law occurring at the trial, to wit: (*a.*) Permitting the plaintiff to dismiss the suit as to his second paragraph of complaint, and to withdraw his evidence after closing his case, and while the defendant was introducing his evidence, and then permitting the plaintiff to again open his case and introduce his evidence in support of his first paragraph, over the defendant's objection; (*b.*) Permitting the plaintiff, over the defendant's objection, to introduce in evidence the paper called a petition of the administrator of Tompkins Higday, deceased, without proof of its character and genuineness; (*c.*) Refusing to permit the defendant to testify in his own behalf relative to the payment and set-off by him pleaded to the plaintiff's first paragraph of answer, and sustaining the plaintiff's objections thereto.

The facts were as follows, as shown by the bill of exceptions: The plaintiff made the defendant his first witness, who

testified that said second note was never executed, and that the note described in the first paragraph of the complaint was fully paid to said Higday in his lifetime. The plaintiff then testified for himself, and called William B: Hess as a witness, who also testified in behalf of the plaintiff; then the plaintiff introduced certain documentary evidence.

At this stage of the proceedings, the plaintiff asked leave of the court to dismiss his second paragraph of complaint; the defendant objected, the court overruled the objection, and the suit as to said second paragraph was dismissed.

There was no error in permitting the plaintiff thus to dismiss as to a part of his cause of action. R. S. 1881, section 333; *Dunning* v. *Galloway*, 47 Ind. 182; *Holland* v. *Johnson*, 51 Ind. 346.

The plaintiff then moved the court to strike out all the oral testimony given in the cause, to wit: The testimony of the defendant given on behalf of the plaintiff; the testimony of the plaintiff in his own behalf, and the testimony of the plaintiff's witness, William B. Hess. The defendant objected; the court overruled the objection, and struck out all of said testimony, and the defendant excepted.

The plaintiff then, over the defendant's objection, offered in evidence the note mentioned in the first paragraph of his complaint, and the record of the Laporte Circuit Court, to prove the sale of the note to the plaintiff. The defendant's objection to the introduction of the record for want of a sufficient authentication was overruled, and to this the defendant excepted. The plaintiff then rested. The defendant offered himself as his own witness to prove the facts stated in his answer. The plaintiff objected. The court sustained the objection, and refused to permit the defendant to testify, and to this the defendant excepted. There being no further evidence, the court found for the plaintiff, as hereinbefore stated.

The action of the court in permitting the plaintiff to withdraw all the oral evidence, some of which related exclusively to the first note and some exclusively to the second note, was

clearly erroneous. When the suit was dismissed as to the second note, it would have been proper to strike out all the evidence relating exclusively to the second note, but the oral evidence as to the first note had nothing to do with the second note; it was already regularly before the court, and it was fatal to the plaintiff. The plaintiff, after discovering that the defendant's testimony, which he himself had invoked, was against him, might have dismissed his entire suit, but he could not get rid of the unfavorable evidence as to the first note, by dismissing as to the second note.

To permit either party at a trial to withdraw evidence introduced on his own motion, merely because it proved to be favorable to the other party, would be absurd, and when in a suit on two notes testimony has been introduced in reference to both, the dismissal as to one of the notes gives the plaintiff no right to withdraw his testimony as to the other note, when it is favorable to the defendant, unless the defendant will consent thereto. When the plaintiff in this case made the defendant his witness, he took the risk, and had no privilege to retain the testimony if favorable, and reject it if unfavorable.

We think, also, that the court did not err in admitting the alleged records of the Laporte Circuit Court. The record shows that they were attested by the seal of the court. R. S. 1881, section 462. But we think there was no error in refusing to permit the defendant to testify as a witness in his own behalf. The plaintiff was the assignee of an administrator; he had the same right to the note that any legatee would have had, for whose benefit the note had been filed in court by the administrator, under section 2302, R. S. 1881. In an action by such a legatee on such a note, this court has held that the maker of the note is not a competent witness to prove payment to the intestate in his lifetime, if objection be made by the other party. The court held substantially that, when such uncollected notes are assigned by an administrator pursuant to the statutes, such assignment "will not restore the competency of witnesses, who would have been incompetent

if the action had been brought by an administrator or executor." *Peacock* v. *Albin*, 39 Ind. 25. It is not necessary to consider the first and second reasons alleged for a new trial. For the error occurring at the trial, as hereinbefore pointed out, the court below should have granted a new trial. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

Filed April 19, 1884.

No. 11,072.

CLIFT ET AL. *v.* BROWN ET AL.

APPEAL BOND.—In all appeals to the circuit court, a defective appeal bond is cured by filing a new one as that court may require. R. S. 1881, section 1283.

HIGHWAYS.—*Appeal.—Trial.—Practice.*—In an appeal from the county commissioners from an order establishing a highway, the report of viewers or reviewers is not in question, but the cause is to be tried *de novo*.

SAME.—*Description of, in Petition.*—A petition for a highway, which describes it so that a surveyor could locate it, is sufficient, if otherwise without fault.

From the Henry Circuit Court.

D. W. Chambers, J. S. Hedges, L. P. Mitchell and *W. Grose*, for appellants.

COLERICK, C.—The appellees and others presented to the board of commissioners of Henry county, at its June session, 1882, a petition for the location of a public highway. Viewers were appointed to view the same, and they reported that the proposed highway would be of public utility, and that they had laid out and marked the same. Before any action was taken by the board upon this report, a remonstrance against the location of the proposed highway was filed by the

appellants, on the ground that it would not be of public utility, and reviewers were appointed to view the same, who reported that it would be of public utility, and thereupon the appellants remonstrated against its location on the ground that, if it was located and opened as proposed, it would pass through their lands and thereby cause them great damage, and asked the board to appoint reviewers to assess the damages, and reviewers were accordingly appointed for that purpose, and they reported that the appellants Elisha Clift and Waterman Clift would be damaged in the sum of $150 each, and the appellants John Cray and Sallie Cray in the sum of $30. Upon the presentment of this report, the board determined that the damages so assessed were greater than the utility of the proposed highway would justify the payment of out of the county treasury, and, therefore, that the proposed highway should not be established, as prayed for. From this decision the appellees appealed to the circuit court, and there the appellants moved to dismiss the appeal for the following reasons:

1. Because the appeal was only taken by a portion of the plaintiffs, and not by all of them.

2. Because the condition of the appeal bond was not in the form required by the statute.

3. Because the appeal bond was not approved by the county auditor.

Before this motion was determined, the appellees were required by the court to file, and did file, a new bond, in proper form, which was approved by the court, and thereupon the motion to dismiss the appeal was overruled. The action was submitted to a jury for trial, who found that the proposed highway would be of public utility, and that the appellants would not be damaged by reason of its location and opening, and, over motions for a new trial and in arrest of judgment, judgment was rendered against the appellants, from which they appeal, and assign as errors for its reversal: 1. That the court erred in overruling the motion to dismiss the ap-

peal. 2. That the court erred in overruling the motion in arrest of judgment. 3. That the court erred in overruling the motion for a new trial.

No error was committed in overruling the motion to dismiss the appeal. The record shows that both of the appellees appealed from the decision of the board, and they alone prosecuted the appeal. If the appeal bond was defective in form or substance, and was not approved by the county auditor, as asserted by the appellants, the defects and informalities complained of were remedied and cured by the new bond that was given. The statute provides: "In all cases where an appeal shall be taken from a justice of the peace, board of county commissioners, viewers, or commissioners to assess damages, or from any other person or tribunal, to the circuit court, and the appeal bond filed in such case shall be defective in substance or form, or for want of proper approval, such case shall not be dismissed on account of such defect or informality, if the appellant will, when required by the court to which such appeal is taken, file in such court a sufficient bond, with surety to the acceptance of such court, in such sum as such court shall require." R. S. 1881, section 1283. See *Meehan* v. *Wiles*, 93 Ind. 52; *Crumley* v. *Hickman*, 92 Ind. 388. The appellants, in their brief, urge other reasons in support of the motion to dismiss the appeal that are not embraced in the motion. We can not consider them as they are not properly before us for consideration. The appellants are confined to the reasons assigned in the motion.

It is insisted by the appellants that the report of the viewers was defective in form and insufficient. No objection was made to the form of the report before the board of commissioners. All objections to such reports must be presented to the board, and if not there presented they are deemed as waived. *Green* v. *Elliott*, 86 Ind. 53; *Lowe* v. *Ryan*, 94 Ind. 450. No objection was made to the report in the circuit court, but the case was there tried on its merits. In *Turley* v. *Oldham*, 68 Ind. 114, it was said by this court: "In highway

cases, on appeal from the commissioners of the county, the reports of the viewers and reviewers have no further value, for any purpose. On such an appeal, such reports, by force of law, and without any motion to that effect, are vacated and set aside, whenever the cause is tried on its merits in the circuit court."

Many reasons were assigned in support of the motion for a new trial, but the only ones urged, or even referred to, by the appellants in their brief, are, that the verdict was contrary to the evidence, and that the court erred in permitting certain items of proof, referred to in the motion, to be introduced. It appears by the bill of exceptions that all the evidence given on the trial of the action is not contained therein, although it professes to contain the same. In its absence we can not determine as to the sufficiency of the evidence to sustain the verdict. See *McNaught* v. *McAllister*, 93 Ind. 114, and the cases there cited. We have examined the evidence set forth in the bill of exceptions, and discover that, while conflicting, it tends to sustain the verdict, and, therefore, if considered as the entire evidence in the case, we can not disturb the verdict on the weight of the evidence. No error was committed by the court in admitting the items of evidence complained of, as they were competent for the purposes for which they were introduced. The motion for a new trial was properly overruled.

The only reason urged by the appellants in support of the motion in arrest of judgment is, that the proposed highway was not sufficiently described in the petition, wherein it is described as follows: "Commencing about 80 rods west of the north-east corner of section two (2), township eighteen (18) north, range ten (10) east, where the road running east from Springport intersects the dirt road, sometimes known as the Irvin or Bazzle road; thence east on the township line dividing sections two (2) and thirty-five (35), and one (1) and thirty-six (36), to the range line; thence east between sections six (6) and thirty-one (31), and sections thirty-two (32) and

five (5), to the road running north from Rogersville, a distance of about two and one-half (2½) miles."

It has been held by this court that a description of a proposed highway which is sufficiently definite to enable a surveyor to locate the highway is all that the law requires. *Conaway* v. *Ascherman*, 94 Ind. 187. Tested by this rule, we think that the proposed highway was sufficiently described. There is no error in the record.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed April 19, 1884.

No. 7921.

JOHNSON ET AL. *v.* PUTNAM.

PLEADING.—*Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of answer, all the material averments of which may be proved under another paragraph upon which issue is joined.

ASSAULT AND BATTERY.—*Pleading.*—*Trespass.*—A complaint for trespass to the person, which averred that the plaintiff was lawfully in possession of a building, and that the defendants with great force assaulted her and put her out of the house, injuring her person, counts only for the assault and battery, and not for breaking the plaintiff's close, and an answer, which shows only that the defendants were in possession rightly, is bad on demurrer.

SPECIAL VERDICT.—*Venire de Novo.*—*Practice.*—A special verdict is not defective for failure to find as to immaterial matters put in issue, but if it find all material issues, a *venire de novo* should not be awarded.

SAME.—If a special verdict fail to find on any material issue, it has the effect of a finding against the party who had the burden of that issue.

SAME.—*Presumption.*—It is the office of a special verdict to find only the facts established by the evidence, and therefore, if there be no finding upon an issue, the presumption is that there was no evidence upon it, and a *venire de novo* should not be awarded.

From the Superior Court of Marion County.

J. C. Denny, D. V. Burns, H. Burns and *C. S. Denny*, for appellants.

A. C. Ayres, E. A. Brown, J. W. Gordon, R. N. Lamb and *S. M. Shepard*, for appellee.

FRANKLIN, C.—This was an action of trespass, brought by the appellee against the appellants, for an assault and battery. The complaint is in two paragraphs. The first is the common law count of trespass for the assault and battery. The second sets out that the plaintiff, on the 26th day of June, 1877, entered into a written contract with George W. Julian and John O. Hopkins, a majority of the board of school trustees of the town of Irvington, to teach the public school of said town of Irvington for a term of nine months, beginning on the 3d day of September, 1877. A copy of the contract is set out as a part of this paragraph. That Sylvester Johnson, the third trustee, was notified of the meeting at which plaintiff was employed, but refused to attend the same; that said Julian and Hopkins delivered to her the keys of the school building at the time they employed her; that in pursuance of her said contract the plaintiff was about to enter upon the discharge of her duties as teacher of said public school on the 3d day of September, 1877, in said public school building, and was in the peaceable possession of the same under her said contract, when the said defendants, by force and arms, assaulted her, and then and there, with great force and violence, seized and laid hold of her, and dragged her from said school-room in said house, and pushed her through the halls and down the stairs of said building, and pushed her with great force from said house; and also, then and there, shook and pulled about the said plaintiff, and then and there bruised her by pushing her against the walls of the said building, and then and there, by violently unloosing her hand from a staple in said wall, tore the skin from the index finger thereof, to her damage, etc.

To which complaint the appellants jointly answered, first, a denial; second, that they, as the school trustees of the town of Irvington, had the possession of the school-house thereof, and that the plaintiff, wrongfully and by force and arms, broke into and took possession of the said public school-house; that they notified plaintiff that she was wrongfully in possession

of said school-house, and requested her to vacate the same, and deliver the possession thereof to them as such trustees; that she refused to do so, and thereupon they took hold of her, and ejected her from said school-house, using no more force than was necessary for that purpose; that this was the grievance complained of, and none other; and concluded with a denial of all the allegations of the complaint not herein specifically admitted.

The third paragraph of the answer is to the second paragraph of the complaint, and is similar in some respects to the second, but contains the further allegations that, at the time the plaintiff wrongfully and forcibly took possession of the school-house, she claimed the right to the possession thereof, under and by virtue of the contract set out and referred to in her said second paragraph of complaint; that said contract gave her no right to the possession of the said school-house for the reasons following:

1st. That George W. Julian was not a legal school trustee of said town, and had no right to enter into said contract, of which plaintiff had notice.

2d. That these defendants, composing the board of school trustees of said town, had, before the happening of the pretended grievances complained of, to wit, on the 14th day of August, 1877, revoked and annulled said contract, due notice of which was at the time given to the plaintiff.

3d. The contract in nowise related to the possession of the school-house, but only to the services of the plaintiff as teacher.

4th. That at the time the contract was executed, the plaintiff was not licensed to teach in the public schools.

That on the morning and before the happening of the grievances complained of, they notified the plaintiff that the contract had been revoked. This paragraph then concludes as in the second.

The defendants Johnson and Shank jointly answered in three paragraphs, similar to the three paragraphs in the joint

answer of all the defendants, to which answers the plaintiff severally and separately demurred to the second and third paragraphs of each.

The demurrers were sustained to the third paragraph of each, and overruled as to the second paragraph of each; exceptions were taken. Replies in denial to second paragraph.

Trial by jury, and a special verdict returned as follows:

"We, the jury, having been required to find a special verdict in the said cause, do find the facts to be as follows: 1st. That the town of Irvington, in the county of Marion and State of Indiana, is an incorporated town, under and by virtue of the laws of the State of Indiana; that on the 3d day of June, 1875, George W. Julian was, by the board of trustees of the said town of Irvington, appointed one of the trustees of the schools in and for said town for the period of three years; that said Julian, within a few days after that time (records do not show the date, except in the month of June), took the oath of office as such trustee, and entered upon the discharge of the duties of his office; that at the time one Oliver M. Wilson and S. M. Houston were his co-trustees of schools for the said town; that the said Julian, Wilson and Houston organized said school board, and elected officers for the same as follows, to wit: George W. Julian, president, O. M. Wilson, secretary, and S. M. Houston, treasurer; that said persons were and acted as such trustees of schools for said town until the 9th day of June, 1876, when the term of S. M. Houston expired, and Professor John O. Hopkins was appointed by the said civil board of trustees of said town of Irvington for the term of three years from said last mentioned date; that immediately thereafter the said Hopkins accepted said appointment, and took the oath of office as such trustee, and entered upon the discharge of the duties of his office as such trustee; that on the 13th day of June, 1876, the said trustees, Julian, Wilson and Hopkins, organized themselves as such board of trustees of schools for said town of Irvington, by electing said Julian president, Wilson

as secretary, and said Hopkins as treasurer thereof; that as such treasurer the said Hopkins filed with the auditor of the county of Marion and State of Indiana, with two good freehold securities in the sum of three thousand dollars ($3,000), his official bond as such treasurer; that the same was approved by the said auditor; that said Julian, Wilson and Hopkins continued to act and be recognized as such school trustees during the remainder of the year 1876, and up to the 1st Monday of June, 1877, when the term of office of said Wilson expired; that during the school year of 1876 the said trustees, last above named, had employed the plaintiff in this action as a teacher in the public school of said town; that the term of that school expired in June, 1877; that on the 4th day of June, 1877, the civil board of trustees of said town of Irvington appointed the defendant Sylvester Johnson one of the school trustees of the said town of Irvington, in the place of O. M. Wilson, whose term then expired; that on the 16th day of June, 1877, the civil board of trustees of said town of Irvington passed a resolution as follows, viz.:

"'June 16th, 1877, the board met at the office of J. H. Tilford, and the following action was had: The following resolution was presented and adopted: Whereas Sylvester Johnson and George W. Julian have failed to give bond and properly qualify under the law, as school trustees of the town of Irvington; and whereas the offices for which they were appointed are thereby vacant: Therefore,

"'Be it Resolved, That this board do now go into the election to fill said vacancies. Thereupon, there was an election, resulting in the election of Sylvester Johnson for the long term, and Dr. James A. Krumrine for the short term, as such school trustees of the town of Irvington. And the board adjourned to meet upon the call of the President.

Attest: "'LEVI RITTER, President.

"'C. D. MITCHELL, Clerk.'

"That no other or different order was ever made by said

civil board of trustees of said town in reference to the vacation of the office of the said Julian; that said Julian did not at any time resign or abandon his said office; and that said town trustees never informed said Julian of said order officially, or in any other way, nor was he informed directly or indirectly, before or at the time of the passage of said resolution; nor did said Julian in any manner consent to the same, but on the contrary insisted that he was, and would remain, such legal trustee, until the first Monday of June, 1878; that said Krumrine, mentioned in said resolution, took the oath of office and assumed to act as a trustee of the school board from and after the said 16th day of June, 1877; that said Hopkins refused to be recognized as a member of said school board last elected as aforesaid; but, on the contrary, said Hopkins recognized and acted with said Julian as his co-trustee, so long as he, the said Hopkins, remained a member of the said school board.

"That on the 18th day of June, 1877, said Johnson and Krumrine tendered their joint bond to the auditor of Marion county; the said Krumrine purported to be president, and said Johnson secretary, of said school board; that on the 20th day of June, 1877, the said Julian tendered to the said auditor of Marion county his bond as president of said school board in the penal sum of one thousand dollars ($1,000), in due form of law, with F. M. Finch and E. A. Brown, two good and sufficient freeholders of said county, as his sureties; that the said bond was refused by said auditor on the ground that he had the bond of another person already on file in his office, for the said office, and the refusal was placed upon no other ground; that on the 23d day of June, 1877, said Hopkins again filed with the said auditor his bond as treasurer of said school board, in the sum of three thousand dollars ($3,000), conditioned according to law, with two good and sufficient freehold securities; that said auditor accepted the said bond of said Hopkins, and placed the same on file in his office; that on the 26th day of June, 1877, the said

Hopkins, as such school trustee, notified said Johnson that the said board of school trustees of said school corporation of the town of Irvington would meet that evening at the house of said Hopkins in said town, and requested the said Johnson to attend the same as one of the school trustees; that the said Julian and Hopkins, in accordance with a call by said Hopkins and Julian, as such trustees, did meet at the house of said Hopkins, as such trustees, and did then and there ratify and reduce to writing a contract of employment with the said plaintiff, to teach the public schools in the said town of Irvington, for the school year of 1877 and 1878; that, as such school trustees, they then signed the said contract; that no record of said meeting was kept by said Hopkins and Julian, while acting as such school trustees, on the evening of said 26th day of June, 1877; that said contract is in writing, and is as follows, to wit:

"'This agreement, made and entered into this day between the undersigned trustees of the Irvington public school of the first part, and Lydia R. Putnam of the second part, witnesseth, That whereas the said trustees some weeks ago verbally agreed with the said Lydia R. Putnam that they should retain and employ her to teach the said school for the ensuing school year; and whereas it is deemed expedient now to reduce the said verbal contract to writing, and set forth the terms and conditions of the employment of the said Lydia R. Putnam to teach said school: Therefore, and to this end, it is hereby stipulated by the said parties that said Lydia R. Putnam shall teach said school for the period of nine (9) months, exclusive of vacations; said school to begin on the first Monday of September, 1877; and that said trustees shall pay her for her said services at the rate of sixty dollars ($60) per month. In witness whereof the said parties have hereunto set their hands and seals the 26th day of June, 1877.

"'GEO. W. JULIAN. [SEAL.]
"'J. O. HOPKINS. [SEAL.]
"'LYDIA R. PUTNAM. [SEAL.]'

"That the said plaintiff also, on said night, signed said contract; that the keys of the house, used for that purpose, as the public school-house, were committed to the plaintiff by the said Hopkins and Julian, who were then and there acting as said school trustees; that on the 11th day of July, 1877, said Hopkins resigned his office as such school trustee, and that the defendant William H. H. Shank, on the 2d day of August, 1877, was appointed school trustee in the place of John O. Hopkins, by the board of civil trustees of the said town of Irvington; that he duly qualified and filed his bond on the 9th day of August, 1877; that on the 26th day of August the plaintiff was duly licensed as a teacher by the county superintendent of schools in and for said county of Marion aforesaid; that on the first Monday of September, 1877, the plaintiff herein went to the public school-room in the said town of Irvington, and peaceably and quietly entered the same through the outer door, and was, between the hours of eight (8) and nine (9) o'clock A. M. of said day in the quiet and peaceable possession of a school-room in said house, by virtue of her said contract; that while in such peaceable possession with color of right, the said defendants forcibly, in a rude, angry and insolent manner, took hold of the plaintiff and dragged her from said school-room, out through the cloak-room and hall of said school-house, and out of doors; and that in so doing they bruised and lamed her, so that she became and was by reason thereof sick and sore for the space of six days, the said defendants well knowing at the time that the plaintiff was in poor health; that such seizing, dragging and pushing was attended with excitement and violence, and frightened the scholars and other persons who were at and in said room; that it was done in such a violent manner as to cause a breach of the peace.

"If, upon these facts, the law is with the plaintiff herein, then we find for the said plaintiff, and assess her damages at eight hundred dollars ($800); and if the law is for the defendants, then we find for the defendants.

"JAMES B. MANN, Foreman."

The plaintiff moved for judgment in her favor on the special verdict of the jury. The defendants moved for a *venire de novo*. The motion for a *venire de novo* was overruled, and the defendants filed a motion for a new trial, which was also overruled, to which rulings the defendants at the time excepted, and the court rendered judgment on the special verdict for the plaintiff for $800. The defendants appealed to the general term of the superior court, which court affirmed the judgment of the superior court in special term. The error assigned in this court is, the superior court in general term erred in affirming the judgment of the superior court in special term. The errors assigned in the superior court in general term are:

1st. Overruling defendants' motion for a *venire de novo*.

2d. Overruling defendants' motion for a new trial.

3d. Sustaining plaintiff's demurrer to the third paragraph of defendants' joint answer.

4th. Sustaining the demurrer to the third paragraph of defendants' separate answers.

The third and fourth assignments of error naturally arise first, and as they both embrace the same, the sufficiency of the third paragraphs of the joint and separate answers, both being the same in principle, they may be considered together.

Counsel for appellants insist that these paragraphs of the answers ought to be held good as to the second paragraph of the complaint, for the reason that said paragraph of the complaint is the same as a common law count for trespass *quare clausum fregit*, and these answers go to the question of the right to the possession of the house, that defendants had that right, and plaintiff did not; that the most that could be said of plaintiff's right was that she only had a license, and that was subject to revocation by defendants at pleasure.

We do not think appellants' counsel place a proper construction upon the second paragraph of the complaint; in that paragraph, plaintiff does not call upon the defendants to

show cause why they broke and entered her close; they are not charged with breaking and entering her premises; she makes no complaint of their entering the house. The language of her complaint is, that while she was peaceably in the possession of the house, under the said contract, the defendants, by force and arms, assaulted her, and then and there, with great force and violence, seized and laid hold of her, and dragged, etc. This paragraph is simply for an assault and battery.

We have omitted discussing the arguments and citing the authorities of appellants' counsel upon the questions of the right to possession, and the power to revoke a license for possession, for the reason that we do not think this is an action for trespass *quare clausum fregit*, and they are not applicable to this case.

We think these paragraphs of the answers are insufficient to constitute defences to the second paragraph of the complaint. If they were sufficient, all the material allegations which they contain, that would be admissible in evidence upon a trial of the cause, if not under the general denial in the answer, would be admissible under the second special paragraph of the answer, and the sustaining of the demurrer would not be an available error, for no harm would be done appellants thereby.

The first assignment of error is upon the overruling of the motion for a *venire de novo*.

Under this, the objections to the special verdict are:

1st. It does not find whether the house from which plaintiff was ejected was the public school building.

2d. It does not find whether the house was under the control of defendants as school trustees at the time plaintiff entered it.

3d. It does not find whether the defendants at the time were acting in their official capacity as school trustees, and whether they first notified her to vacate and deliver possession to them, and whether they used more force than was necessary to eject her from the school-house.

Under these objections we have been referred to the following authorities: *Jenkins* v. *Parkhill*, 25 Ind. 473; *Gulick* v. *Connely*, 42 Ind. 134; *Whitworth* v. *Ballard*, 56 Ind. 279.

We have examined these cases, and find the rule to be, that if the jury in their special verdict fail to find upon all the issues, a motion for a *venire de novo* will be sustained. The issues in this case were, did the defendants commit an assault and battery upon the plaintiff? Were they justifiable or excusable in what they did? Were they guilty or not guilty? See the case of *Gazette Printing Co.* v. *Morss*, 60 Ind. 153.

We do not understand these decisions to go to the extent that each allegation in the complaint and answer is to form a separate and distinct issue in the case; some of them may be immaterial, and constitute but very little, if any part, of the real issues in the case.

This court, in the case of *Graham* v. *State, ex rel.*, 66 Ind. 386, used the following language: "There is no difference, between a special verdict and a special finding by the court, except that the special verdict finds the facts only, and the court afterward pronounces, or rather applies the law to the facts found, and renders judgment accordingly; while, in a special finding, the court states the conclusions of law upon the facts found, so that the parties can except to the conclusions. Neither a special verdict nor a special finding can do more in relation to facts than to find or state them. But what facts are to be thus found or stated? Clearly those that are proved upon the trial, and none other. When the special verdict has found the facts proved on the trial, it has performed its entire office; and when the special finding has stated the facts proved on the trial, it has performed its entire office, so far as the facts are concerned. Of course the facts may be proved by circumstance or otherwise, as in any other mode of trial. But suppose there are issues in the cause concerning which no evidence is given. There is nothing in such case in relation to those issues for the court or jury, in finding specially, to pass upon. No fact in rela-

tion to them has been proved, and, hence, no fact in relation to them is to be found or stated, because, as we have seen, the special verdict or finding is confined to the facts proved. In the case supposed, it would seem that, in rendering judgment, the issues concerning which no facts are found should be regarded as not proved by the party on whom the burden of the issue or issues lies."

If the issue failed to be found upon is to be regarded as not proved, then the facts constituting an issue, not being found, are to be regarded as not having been proved. If the special verdict or finding is silent as to any fact in issue, that fact is to be regarded as not proved by the party upon whom the burden of proof lies. If there was proof of a fact not found, the remedy is by motion for a new trial. *Vannoy* v. *Duprez*, 72 Ind. 26; *Martin* v. *Cauble*, 72 Ind. 67; *Jones* v. *Baird*, 76 Ind. 164.

Under these authorities the objections to the special verdict in this case are not well taken, and there was no error in overruling the motion for a *venire de novo*.

The last assignment of error to be considered is the overruling of the motion for a new trial. The reasons assigned for a new trial are, the verdict was not sustained by the evidence, excessive damages, and the admission of improper evidence. The jury found facts which constituted excessive force, and that it was used in a rude, insolent and angry manner. The evidence clearly tended to support the finding. This court will not reverse a judgment upon the weight of the testimony, when the evidence tends to support the verdict. As to excessive damages, while the amount may appear to be somewhat extravagant, yet we see nothing in the evidence that would justify this court in interfering with the verdict for that reason. This is a question purely for the sound discretion of the jury, and, unless there has been a clear abuse of the exercise of that discretion, it must rest as fixed by the jury.

The following testimony given by the plaintiff is objected to:

"I went around and went in the back door, and was going up-stairs. It was a short flight of steps. I was about half way up those stairs, and the children came out of the school-room, and the little ones got on the stairs and delayed me. I could not get up on account of the children. They were in my way. While I was on the stairs, before I got quite to the top, I think Mr. Johnson came out and caught me again. He could not drag me down the stairs, for the children were there in the way. I got my hand in a staple; there is some dispute about it, but I think it is on the inside of the outer door. I grasped that staple. Mr. Johnson held my left arm. Mr. Shank tried to unloose my grasp, but did not succeed very well. Mr. Johnson told Dr. Krumrine to come and help. Dr. Krumrine came and took hold of my fingers and twisted them that way. Of course I was obliged to unloose my grasp. Of course it hurt me considerable, taking my hand out of the staple by force."

Upon an examination of the bill of exceptions, in the record containing the evidence, it appears that this evidence was introduced without any objection from appellants, and no exceptions were taken to its introduction. The only objection that appears in the record is contained in the motion for a new trial, and this does not properly get the objection and exception into the record. The facts testified to, however, followed immediately after the first trouble, and were a part of the same transaction, and competent evidence.

The following testimony given by William K. Sproule was objected to, and an exception at the time properly reserved:

"Question. You may state whether the bond (referring to Julian's bond) was rejected for insufficiency of the security or informality of the bond.

"Answer. There was no objection to the sufficiency of the security."

We think this testimony was immaterial, but we do not see how it could injure appellants. If an error, it was a harmless

one. We see no available error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at appellants' costs.

ELLIOTT, J., did not participate in the decision of this cause.

Filed Feb. 13, 1884. Petition for a rehearing overruled April 19, 1884.

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No. 11,286.

HARDENBROOK *v.* TOWN OF LIGONIER.

TOWNS.—*Ordinances.—Publication.—Pleading before Justices.*—In a suit before a justice of the peace for the violation of a town ordinance, it is not necessary to aver that the members of the board of trustees which passed it were duly elected, nor that they had authority to pass the ordinance, nor that it had been published.

SAME.—*Constitutional Law.—Penalty.—Imprisonment.*—A penalty for the violation of a town ordinance is not a debt, in the sense of the Constitution, which forbids imprisonment for debt.

From the Noble Circuit Court.

H. G. Zimmerman, for appellant.

ELLIOTT, J.—The complaint of the appellee sets forth at length an ordinance adopted by the board of trustees of the town of Ligonier requiring license from venders of intoxicating liquors, avers that the town was duly incorporated, and charges that the appellant violated the provisions of the ordinance by selling liquor in less quantities than a quart without a license.

It is not necessary that a complaint for the violation of a town ordinance should aver that the board was duly elected; it is enough to allege that the ordinance was enacted by the trustees of the corporation. A defendant in an action to recover a penalty for the violation of a municipal by-law can not question the right of the trustees to their offices, nor can

that right be tried in any such collateral proceeding. The right to an office must, as a general rule, be questioned by a direct proceeding in the nature of a *quo warranto*.

It is sufficient to aver that the ordinance was adopted by the trustees, without showing the manner of their election. The law confers upon the trustees authority to enact by-laws, and it is only necessary to allege that the ordinance was enacted by them. Where the pleader names the body by whom the ordinance was adopted, the court will, as matter of law, determine whether the body possessed the requisite authority. The complaint must state by what municipal officers the by-law was enacted, and the court will ascertain and decide whether the statute invested that body with the authority which it assumed to exercise. Matters of law need not be pleaded, and whether town trustees have power to adopt ordinances is a matter of law of which the court will, *ex officio*, take notice. *Green* v. *City of Indianapolis*, 22 Ind. 192; *Green* v. *City of Indianapolis*, 25 Ind. 490.

It is clear from the various statutory provisions that have been enacted in the form of original, legalizing, amendatory and supplemental acts, that the Legislature did not intend that in actions on town ordinances the legality of the election of trustees should be made the subject of investigation. We do not deem it necessary to refer to the many provisions upon this subject, for no substantial good would be accomplished by such a course. There is nothing in the provisions of section 3309 which devolves upon the town corporation the burden of proving that the legislative officers of the town were duly elected and qualified. The presumption is in favor of the legality of the election and qualification of corporate officers, and the statute does not affect the force of this presumption. The general rule is that in prosecutions for violations of city or town ordinances, all that need be shown is that the persons assuming to be officers acted as such. 1 Dillon Mun. Corp. (3d ed.), sec. 418.

The validity of the ordinance is assailed because, as it is

assumed, it does not affirmatively declare when it shall take effect. If this position were sustained in fact, it would be without support in law. An ordinance of a municipal corporation takes effect according to the provisions of the organic law—the charter or act of incorporation—and if the ordinance were wholly silent upon the subject, it would take effect under the provisions of the incorporating act. It is not the declaration of the ordinance which puts it into force, but the provisions of the statute which created the corporation. But the position, that the ordinance does not provide when it shall take effect, is not supported by the record; the ordinance does provide that it "shall be in force from and after its passage and publication." The reasonable and just interpretation of this provision is, that the ordinance shall take effect after publication in the manner, and for the length of time, prescribed by the incorporating act.

The averment of the complaint upon the subject of publication reads thus: "Which ordinance was by the said board of trustees caused to be published in the Ligonier Banner (a newspaper printed and published in said town of Ligonier) according to law," and this we think sufficient. Actions to recover penalties for violations of municipal ordinances are civil actions, and complaints are not required to be framed in accordance with the strict rules of pleading; on the contrary, great liberality is indulged in favor of such complaints, as, indeed, is the case with all such pleadings before justices of the peace. *Town of Brookville* v. *Gagle*, 73 Ind. 117; *City of Greensburgh* v. *Corwin*, 58 Ind. 518; *City of Goshen* v. *Croxton*, 34 Ind. 239; *Common Council, etc.*, v. *Fairchild*, 1 Ind. 315; *Levy* v. *State*, 6 Ind. 281; *Bogart* v. *City of New Albany*, 1 Ind. 38. But the provisions of the statute so plainly settle this question that discussion is not needed. Section 3331 provides that it shall not be necessary to show publication "unless the same is controverted by affidavit." *Green* v. *City of Indianapolis*, 25 Ind. 490.

It is contended that section 3347 of the statute is void be-

cause it provides for imprisonment in case of a conviction and failure to pay the fine assessed. This position is based on the proposition that the Constitution prohibits imprisonment for debt. It is clear to our mind, too clear, indeed, for argument, that a penalty accruing from a breach of an ordinance of a municipal corporation is not a debt within the meaning of the Constitution. *McCool* v. *State*, 23 Ind. 127; *Lower* v. *Wallick*, 25 Ind. 68; *Turner* v. *Wilson*, 49 Ind. 581; *McIlvain* v. *State, ex rel.*, 87 Ind. 602; *Lane Co.* v. *Oregon*, 7 Wal. 71; *Dunlop* v. *Keith*, 1 Leigh, 430; *Caldwell* v. *State*, 55 Ala. 133; *Hibbard* v. *Clark*, 56 N. H. 155; *City of Camden* v. *Allen*, 26 N. J. Law, 398; *Flora* v. *Sachs*, 64 Ind. 155.

Judgment affirmed.

Filed April 19, 1884.

No. 11,601.

NORRIS *v.* THE STATE.

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BLACKMAILING.—*Criminal Intent.*—*Evidence.*—Indictment for violation of section 1926, R. S. 1881, by sending a threatening letter to C. to extort money. The evidence of guilt was not conclusive. The defence was that the letter was sent as a joke. The defendant and C. were intimate friends, and there was evidence tending to prove the defence, and especially establishing his good character. He offered to prove that shortly before this transaction C. had perpetrated several severe jokes (stated) upon the defendant, but was not permitted.

Held, that the evidence was admissible upon the question of intent.

From the Lagrange Circuit Court.

O. L. Ballou and *J. D. Ferrall*, for appellant.

F. T. Hord, Attorney General, *F. D. Merritt*, Prosecuting Attorney, and *J. S. Drake*, for the State.

HAMMOND, J.—The appellant and one Lucius Vedder were jointly indicted for blackmailing, under section 1926, R. S. 1881. The statute, so far as applicable to the present case, reads as follows:

"Whoever * * * knowingly sends * * * any letter * * with or without a name subscribed thereto, or signed with a fictitious name; * * accusing or threatening to accuse any person of any crime punishable by law, * * * with intent to extort or gain from such person any * * * money, * * * is guilty of blackmailing, and shall, on conviction thereof, be imprisoned in the State prison for not more than five years nor less than one year, to which may be added a fine not exceeding one thousand dollars."

The indictment was in two counts, differing in no material respect, and charging the appellant and Vedder with sending to one James B. Hart, who was also known by the name of "Can" Hart, a letter, with the fictitious name of John Stockdale subscribed thereto, falsely charging said Hart and one Philip Deter with the larceny of a whip, with intent to extort the sum of $5. A copy of the letter was set out in each count of the indictment, as follows:

"LAGRANGE, IND., July 28, 1883.

"Can Hart: You and Philip Deter *stoled* my whip last night. I will just give you ten days from this date to settle, or I will have you both arrested. You can settle by leaving five dollars in a letter at the post-office for me. My team was hitched at Ellison's bank. Address, John Stockdale, Lagrange, Ind."

Upon the plea of not guilty, the appellant was tried separately. The jury returned a verdict of guilty, assessing his punishment at imprisonment in the State prison for one year. Judgment was rendered upon the verdict. Motions were made by the appellant, at the proper time, to quash each count of the indictment, for a new trial, and in arrest of judgment. These motions were severally overruled, an exception was taken to each ruling, and said rulings are assigned for error in this court.

Counsel for the appellant make objections to each count of the indictment, upon the supposition that certain allega-

tions, deemed essential, are wanting. These, however, have been overlooked by counsel, for, as a matter of fact, they are found in each count. There was no error in overruling the motion to quash, or the motion in arrest of judgment.

There was evidence tending to show that the appellant, Vedder, Hart and Deter were quite intimate acquaintances and were upon friendly terms. On the day of the writing of the letter set out in the indictment, the appellant, on meeting Hart and Deter in Lagrange, was informed by them that some one had taken their whip, which was a good one, from their buggy, leaving in its place a piece of an old whip. They were trying to find the person that had taken their whip. Soon afterwards they were seen by the appellant and Vedder getting into their buggy and starting towards their home. The appellant then wrote the communication, copied in the indictment, and placed it in an envelope, directing it to Hart at Lagrange. He handed it to Vedder to be put in the post-office, which was done by the latter a few days afterwards. It was received by Hart at the postoffice. He procured at the postoffice a money order for $5, payable to "John Stock-dale," and sent it, directed to that name, through the post-office. It was taken out by the appellant and Vedder. They procured the money on it from the postmaster by using the name, "John Stockdale." The appellant subsequently returned the money to Hart, but at what time or under what circumstances he did this is not shown in the evidence. The name, "John Stockdale," was fictitious, there being no person in the vicinity known by that name.

The theory of the defence was that the writing and sending of the letter were done merely in sport, with the view of having merriment at Hart's discomfiture on its receipt. There were circumstances in the case that gave plausibility to this theory. Persons who had known the appellant for years testified to his good reputation for honesty, and there was no evidence to the contrary. He lived in the same neighbor-

hood with Hart. They were familiar with each other and were friends.

At the trial the appellant proposed to testify in his own behalf, that a short time before sending the letter to Hart, several "rough jokes," as they are termed, the character of which are set out in the bill of exceptions, were perpetrated on him by Hart and Deter. The evidence, on the objection of the State, was excluded. In this there was error. The fact of Hart and Deter playing "rough jokes" on the appellant would not, of course, justify or excuse the writing of a letter with intent to extort money. But, as bearing upon the question of such intent, it was proper for the jury to know the previous relations of the parties—whether their intimacy and conduct towards each other had been such as to make it reasonable that the transaction upon which the indictment was based, was intended as nothing more than a jest. The gist of the offence charged in the indictment was the sending of the letter to Hart with intent to extort money from him. Unless such intent existed in the mind of the appellant at the time of sending the letter, there could be no crime. If the letter was sent merely in sport, to give annoyance, but with no intent to extort money, however reprehensible the act may have been, it would not constitute the offence of blackmailing. The jury should have had the benefit of all evidence bearing upon the question of intent. Some of the "rough jokes" which the appellant proposed to prove had been played upon him by Hart and Deter were quite as culpable as the sending of the letter complained of, if the sending of it was by way of joke and without intent to extort money. The evidence offered, but excluded by the court, would have given strength and probability to the defence relied upon by the appellant.

It is true that in criminal cases evidence of collateral matters is usually inadmissible. An exception to the rule exists, however, where such collateral matters bear upon the question of intent. Wharton Crim. Ev., section 46; Best Ev. 264,

1 Greenl. Ev., section 54. To constitute a crime an evil intent must combine with an act. 1 Bishop Crim. L., sections 204, 285, *et seq.* In section 287, the learned author says: "The doctrine which requires an evil intent lies at the foundation of public justice. There is only one criterion by which the guilt of men is to be tested. It is whether the mind is criminal. Criminal law relates only to crime. And neither in philosophical speculation, nor in religious, or moral sentiment, would any people in any age allow, that a man should be deemed guilty unless his mind was so. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it can not exist." In the absence of a felonious intent to extort money from Hart at the time of sending the letter, the appellant could not be guilty. If, without such intent, the letter was sent only for the mischievous purpose of annoyance, the crime charged would not be made out. The question of intent, in a criminal prosecution, is one of fact and often difficult to ascertain. The writing and sending of the letter set out in the indictment might, *prima facie*, import an intent to blackmail. Yet the circumstances under which it was written, and the previous relations of the parties, might be considered by the jury, either for the purpose of strengthening or rebutting the presumption of crime. The evidence offered by the appellant, and excluded by the court, would have tended to show that the letter was not sent with the intent to extort money. The evidence of the appellant's guilt as it comes to us in the record is far from conclusive. We can not say that, if the offered evidence had been admitted, a different result would not have been reached. The case does not, therefore, fall under section 1891, R. S. 1881, which requires this court to disregard technical errors which do not, in our opinion, prejudice the substantial rights of the defendant. The error in the record may have been vital and may have led to an improper conviction. The appellant's motion for a new trial should have been sustained.

Judgment reversed. The warden of the State prison in which the appellant is confined will cause him to be delivered to the jailor of the proper county, to abide the order of the court below.

Filed April 19, 1884.

No. 11,195.

95 78
137 299
137 395
95 78
143 178

FLEMING ET AL. *v.* HIGHT ET AL.

GRAVEL ROADS.—*Appeal.*—*County Commissioners.*—One who, in proper time, files an affidavit showing a substantial interest in the subject, and that he is aggrieved, and a proper bond, has a right to appeal from an order of the county commissioners establishing and ordering the construction of a gravel road, though he did not appear before the board.

SAME.—*Trial.*—In such case the circuit court tries the cause *de novo*, and does not sit as a court for the correction of errors.

From the Monroe Circuit Court.

E. K. Millen and *M. F. Dunn*, for appellants.

J. W. Buskirk and *H. C. Duncan*, for appellees.

NIBLACK, J.—The board of commissioners of the county of Monroe met in special session on the 25th day of April, 1883, to consider a petition which had been filed by Wallace Hight and five others, land-owners of the county and immediate vicinity, with the county auditor, praying for the construction of a macadamized or gravel road on what is known as the Martinsville road, commencing at a point in said road on the corporation line on the north side of the city of Bloomington, in said county of Monroe, and running thence along or near said road to a point where said road intersects the north line of Bloomington township in that county.

After considering the petition, the board appointed three disinterested persons as viewers and an engineer to view the proposed route, and, in case they found the improvement petitioned for a work of public utility, to lay out and locate the

same, fixing the 21st day of May then next ensuing as the day on which they were to assemble for that purpose.

At the succeeding June term of the board, the viewers thus appointed reported that they had examined the premises described in the petition and found the proposed work to be one of public utility; that they had laid out and marked the line of road which the petitioners desired to have constructed; that they had made assessments against the owners of the lands to be benefited, submitting a list of their assessments.

No one appeared to resist the report of the viewers, and nothing being shown against the recommendations which it contained, the board accepted and approved the report, and ordered the road, as laid out and marked by the viewers, to be established and constructed, defining its width and giving directions as to the manner of its construction.

Within the time limited for appeals in such cases, Stephen Fleming and Lewis Weymer filed an affidavit with the county auditor, stating that they were aggrieved by the decision of the board ordering the proposed macadamized or gravel road to be constructed, and enumerating the particular respects in which they were so aggrieved; also stating that they were interested in the proceedings which had taken place as above, in this, that they were owners of real estate, each of the value of $1,000, situate within one mile of the proposed line of road, which real estate would be affected by the construction of said road, and praying an appeal to the circuit court.

This affidavit being accompanied by an appeal bond, with surety to the satisfaction of the auditor, an appeal was accordingly granted.

In the circuit court the attorneys for the petitioners moved to dismiss the appeal upon the alleged grounds: *First.* That the appeal had been prematurely taken, that is, before the cause had been finally disposed of by the board of commissioners. *Second.* That the matters presented by the affidavit filed by the appellants were such as could not be tried in the circuit court. *Third.* That no questions, except those of a jurisdic-

tional character, were presented by the record, and that, by reason of the non-appearance of the appellants to the proceedings before the board of commissioners, all objections to the questions thus presented had been waived. *Fourth.* That as the appellants did not appear before the board of commissioners, their affidavit and appeal bond did not make them proper parties to the cause in the circuit court. The circuit court sustained the motion and dismissed the appeal, and it is from that decision that this appeal is prosecuted.

The order of the board of commissioners establishing the road laid out and marked by the viewers, and directing its construction, was such an order as might be appealed from to the circuit court. This construction of the statute authorizing appeals from the decisions of boards of commissioners is sustained by numerous precedents in highway and other analogous cases decided by this court. *Logan* v. *Kiser*, 25 Ind. 393; *Smith* v. *Scearce*, 34 Ind. 285; *Jamieson* v. *Board, etc.*, 56 Ind. 466; *Board, etc.*, v. *Small*, 61 Ind. 318; *Schmied* v. *Keeney*, 72 Ind. 309; *Doctor* v. *Hartman*, 74 Ind. 221; *Green* v. *Elliott*, 86 Ind. 53; *Breitweiser* v. *Fuhrman*, 88 Ind. 28; *Million* v. *Board, etc.*, 89 Ind. 5; *Dillman* v. *Crooks*, 91 Ind. 158.

These cases, with others which might be cited, also recognize, and, in various ways, affirm, the legal proposition that, upon an appeal from the decision of a board of commissioners in a case like this, the circuit court takes jurisdiction of the proceedings appealed from as an original cause, and not as an appellate court charged with a review merely of those proceedings upon specific objections urged, or errors assigned, by the appellant, and the appellant is not precluded by the proceedings from which he appeals, except in preliminary or incidental matters to which, when opportunity was afforded him, he failed to make objection before the commissioners. Therefore, the cases cited by counsel, which hold that certain proceedings had before boards of commissioners are impervious to collateral attack, have no application to cases in which such proceedings have been directly appealed

from to the circuit court, and consequently stand for trial *de novo* in that court.

It was not necessary that the affidavit of Fleming and Weymer should have specified the particular respects in which they felt aggrieved by the proceedings from which they prayed an appeal. Hence, the specification of grievances contained in their affidavit presented no question for the decision of the circuit court. The affidavit stated explicitly the nature of Fleming's and Weymer's interest in the subject-matter of the proceedings in question, which appears to have been an actual and substantial interest, and that, with the appeal bond, was sufficient to entitle them to an appeal. R. S. 1881, sections 5772, 5773; *Graham* v. *Board, etc.*, 25 Ind. 333; *Leffel* v. *Obenchain*, 90 Ind. 50; *Heagy* v. *Black*, 90 Ind. 534.

The judgment is reversed with costs, and the cause is remanded with instructions to the court below to overrule the motion to dismiss the appeal.

Filed April 19, 1884.

95 81
167 532

No. 10,918.

Baldwin et al. *v.* Burrows.

Replevin.—*Plea of Payment, as Defence.*—*No Recovery for Over-Payment.*—In an action of replevin, an answer was filed alleging in detail purchase by instalments, and over-payment, and demanding judgment for the amount overpaid.

Held, on demurrer, that the answer was good as showing title in the defendant, but that he can not recover for the over-payment.

Same.—*General Verdict.*—*Venire de Novo.*—A general verdict for the defendant in a replevin suit is, as against the plaintiff, a finding on all the issues, and he can not question it by a *venire de novo*.

Same.—*Parol Contract Merged in Written.*—*Not where there is Fraud.*—*Evidence.*—Where, in replevin, the defendant claims title under a parol contract, while the plaintiff claims under a written contract of conditional sale which the defendant charges was procured by fraud, all the facts may be given in evidence to enable the jury to determine which of the contracts is valid.

Baldwin *et al. v.* Burrows.

SAME.—In the absence of fraud in its procurement, a written contract merges a previous verbal contract as to the same matter.

NEW TRIAL.—*Assignment of Error.—Limiting Argument of Counsel.*—Error in limiting the length of an argument is cause for a new trial, but not for an assignment of error.

SAME.—*Judicial Discretion.*—The power to limit argument is in the discretion of the trial court, and limitation to twenty minutes in an action involving but $60 can not be said by the Supreme Court to be erroneous, in the absence of a showing in the record to the contrary.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

M. W. Hopkins, for appellee.

FRANKLIN, C.—Appellants brought an action of replevin against appellee for an organ alleged to be worth $60.

Appellee answered in three paragraphs, first, a denial; second, purchase and payment; third, set-off. A demurrer was sustained to the third and overruled to the second paragraph. A reply in denial was filed to the second. And there was a trial by jury, verdict for the defendant, and, over motions for a *venire de novo* and for a new trial, judgment was rendered for the defendant.

The plaintiffs have appealed to this court and assigned as error:

1st. Overruling demurrer to second paragraph of answer.

2d. Limiting appellants' counsel to twenty minutes in argument.

3d. Overruling motion for *venire de novo.*

4th. Overruling motion for new trial.

From the record, the facts in the case appear to be that one Mrs. Nave kept some kind of a musical store in the city of Danville, in Hendricks county, and that, as agent for appellants, kept their musical instruments for sale. The appellee was a drayman living in the same city, and had been employed by appellants' said agent to haul, transfer and set up musical instruments, such as pianos, organs, melodeons, etc., and haul boxes containing them. After having been so engaged a short time, appellee agreed to purchase of said

agent one of appellants' organs for $60. The parties disagree about the terms of the contract. Appellants insist that it was a conditional sale, that appellee was to pay thereon $5 per month, and that the organ was to remain appellants' property until the contract price was fully paid according to said terms, and on failure to make all the payments, those made were to be forfeited, and the appellants have the right to the possession of the instrument, and an agreement in writing signed by appellee, to that effect, was given in evidence. Appellants then claim that only three payments, making $15, had been paid upon the organ; that the time had elapsed for further payments. They demanded the organ, and upon a refusal to surrender the possession, commenced this action of replevin.

Appellee insists that the contract for the purchase of the organ was made several days before the said agreement bears date or was signed; that the terms of the contract were as follows: When it was made appellants were indebted to appellee under said employment of said agent in the sum of $16.90; that $15 of it was to be credited on the $60 for the organ, and that he was to pay the balance, at stipulated prices, in so hauling, transferring and setting up instruments, furnishing his own help; that before the commencement of this action he had fully paid said contract price for the organ in said services under said contract, and $10 over, for which he demanded judgment.

The appellee set up his foregoing claim as a defence to the action.

The first question presented by appellants is upon the overruling of the demurrer to this defence.

The complaint charges the defendant with having in his possession, without right, the property of the plaintiffs, and that he unlawfully detains the same. The action is to try the right to possession based upon the ownership of the property. In such action whatever puts in issue the title to the property puts in issue the right to possession, and while the appellee

in this action had no right to recover anything for an overpayment, he had the right to plead property in himself, and the defence that he had purchased the property of the plaintiffs, and paid for it, was, in substance, pleading ownership and property in himself. The character of a pleading depends upon the substance of its averments, and not upon the prayer for relief. We think the second paragraph is a sufficient defence to the action.

The objection that the court erred in limiting counsel to twenty minutes in argument, although not a proper specification in the assignment of errors, is properly in the motion as a reason for a new trial.

Appellant has made no argument upon this objection, but has referred us to the case of *Cory* v. *Silcox*, 5 Ind. 370, and in that case the following language is used: "Matters of this kind must necessarily be left to the sound discretion of the court trying the cause; and unless that discretion is grossly abused, we will not interfere." And the case of *Priddy* v. *Dodd*, 4 Ind. 84, is referred to as authority.

Considering the amount involved and the facts in controversy, in the absence of any reason being given to the contrary, we do not see wherein the court grossly abused its discretionary power in limiting the argument, and presume the court correctly discharged its duty in this respect.

As to the overruling of the motion for a *venire de novo*, the verdict of the jury was general, simply for the defendant.

The 549th section, R. S. 1881, provides: "In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property."

A verdict for the defendant was equivalent to a verdict that the plaintiffs were not the owners and entitled to the possession of the property. If the property had been taken by the plaintiffs under the writ, this would have entitled the defendant to a verdict for the return of the property and dam-

ages for the taking of it; if it had not been so taken, no return could have been awarded or damages assessed for taking. But if the defendant was entitled to a sufficient verdict to warrant a judgment for the return of the property and for damages for taking it, but failed to obtain such a verdict, how can that harm the plaintiffs? The plaintiffs can not complain of an error committed in their favor, and that can not possibly do them any injury. There was no error against the plaintiffs in overruling the motion for a *venire de novo*. *Noble* v. *Epperly*, 6 Ind. 468; *Crocker* v. *Hoffman*, 48 Ind. 207.

Under the motion for a new trial, it is further insisted that the court erred in permitting the defendant to prove the parol contract made some days before the execution of the written instrument given in evidence by the plaintiffs. The defendant claimed that the execution of the written instrument had been procured by fraud; that he could not read writing, and the instrument was not read to him before nor at the time he signed it; that he was then told by the person who procured him to sign it, as an inducement to sign it, that it was nothing but an agreement to secure the performance of the work according to the contract.

Under the issues of fact made by the parties in the evidence, we think it was proper to allow the defendant to prove all the facts in relation to the contract for the purchase of the organ, in order to enable the jury to determine whether the execution of the instrument given in evidence by the plaintiffs had been fraudulently procured, what the real contract was, and whether it had been complied with by the defendant. Had there been no controversy about the validity of the written contract, the parol agreement would have been merged into the written agreement, but as the validity of the written agreement was disputed, it was proper for all the facts in relation to the contract to go before the jury for their consideration. There was no error in admitting this testimony.

We have examined the evidence, and although conflicting on many points, still there is evidence fairly tending to sus-

tain the verdict of the jury, and in such cases this court will not disturb it upon the evidence. There is no error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 19, 1884.

No. 11,259.

BROWN, ADMINISTRATOR, *v.* DARRAH ET AL.

PROMISSORY NOTE.—*Assignment.*—*Judgment.*—The assignment of a note, after it has been allowed as a claim against an estate, transfers nothing to the assignee.

From the White Circuit Court.

F. M. Trissal and *R. Gregory*, for appellant.

A. W. Reynolds and *E. B. Sellers*, for appellees.

HAMMOND, J.—The appellant's complaint was in two paragraphs, to each of which the appellees demurred for want of facts sufficient to constitute a cause of action. The demurrer was overruled to the first, and sustained to the second paragraph. The appellant then withdrew the first paragraph, and, declining to amend the second, judgment was rendered for the appellees for costs. The sufficiency of the second paragraph of the complaint is the only question for our consideration. The object of this paragraph was to enforce a vendor's lien. The facts alleged, so far as important, were that John Darrah, in 1864, executed a note to Walter N. Evans for the unpaid purchase-money of certain real estate. Darrah died in 1866. His widow, the appellee Margaret Darrah, was appointed administratrix of the estate. The note was filed and duly allowed against his estate. The estate was afterward settled without the payment of the allowance, although there was real estate which might have been

made assets for that purpose. After the note was allowed as a claim against the estate, it was assigned by endorsement to the appellant's intestate. The real estate for which the note was given is owned by the appellees, subject, as is claimed by the appellant, to the vendor's lien which is sought to be foreclosed in this action.

It is insisted by the appellees that the facts do not show that the appellant's intestate acquired by the assignment of the note, after its allowance against Darrah's estate, any interest in the claim upon which the suit is based.

A judgment operates as a merger of the cause of action upon which it was rendered. *Cissna* v. *Haines*, 18 Ind. 496; *Root* v. *Dill*, 38 Ind. 169; *Ault* v. *Zehering*, 38 Ind. 429; *Gould* v. *Hayden*, 63 Ind. 443; *Marshall* v. *Stewart*, 65 Ind. 243; *Evansville Gas-Light Co.* v. *State, ex rel.*, 73 Ind. 219 (38 Am. R. 129); *Manns* v. *Brookville Nat'l Bank*, 73 Ind. 243. The allowance against Darrah's estate of the note given for the purchase-money had "the full force of a regular judgment in any court." Section 67 of decedents' act of 1852, 2 R. S. 1876, p. 516. A claim allowed against an estate becomes merged in the allowance. *McClure* v. *McClure*, 19 Ind. 185; *Jenkins* v. *Jenkins*, 63 Ind. 120. The assignment of a promissory note after judgment is rendered upon it does not transfer the judgment. A note merged in a judgment, in legal contemplation, has ceased to exist; it is extinguished by the judgment, and its subsequent assignment transfers nothing to the assignee. *Ward* v. *Haggard*, 75 Ind. 381; *Wooten* v. *Maultsby*, 69 N. C. 462; 1 Dan. Neg. Inst., section 728.

No doubt a judgment may be assigned by parol so as to transfer the equitable title. But the complaint fails to aver any assignment whatever, in any manner, of the allowance which was made upon the note. The facts stated in the second paragraph of the complaint do not show any right of action in the appellant, and the demurrer was rightly sustained.

Affirmed, with costs.

Filed April 22, 1884.

No. 10,687.

MOORMAN *v.* SHOCKNEY ET AL.

PRACTICE.—*Uncertainty in Pleading.—Demurrer.*—Uncertainty in a pleading is not presented by a demurrer, unless the uncertainty be such that no cause of action is stated.

SAME.—*Motion to Make More Specific.*—Uncertainty in a pleading should be presented by a motion that the pleading be made more specific.

PROMISSORY NOTE.—*Failure of Payee to Credit Payment.—Remedy of Maker, on Sale of Note.—Complaint.—Demand.—Husband and Wife.*—J., to obtain a loan from M., procured S. to execute to M. his promissory note, and then J. and his wife executed to S. their promissory note for the same amount secured by a mortgage on her land, which note and mortgage, endorsed by S., were delivered to M., together with the other note, both payable in bank, and both given solely to procure said loan. Certain payments made to M. by J. were endorsed on the individual note of S., but not on the other. S.'s note being surrendered to him, M. sold and endorsed the other note and the mortgage, for value and before maturity, to one who had no knowledge of such payments, and who procured judgment on the note and foreclosure of the mortgage. J. being insolvent, he and his wife sold and conveyed the mortgaged premises to the plaintiff, in payment of such judgment. J.'s wife then sued M. for the amount of such payments, alleging the foregoing facts.

Held, on demurrer, that such payments ought to have been endorsed on both notes by M., without request or agreement so to do; that it was not necessary to allege that M. knew the land was the wife's separate property, nor the price he had obtained for the note and mortgage, and that the complaint is good.

From the Randolph Circuit Court.

W. A. Thompson and *J. W. Thompson*, for appellant.

E. L. Watson and *J. S. Engle*, for appellees.

NIBLACK, J.—Action by Rachel E. Shockney and her husband, James N. Shockney, against James Moorman, for the recovery of money. The complaint was in two paragraphs. The first was a common count accompanied by a bill of particulars, and the second specially alleged the facts upon which the demand for judgment was based. A demurrer to the second paragraph was overruled, and the plaintiffs obtained a verdict for $146.50. Upon a remittitur for $38.23

being entered, a new trial was denied, and judgment rendered for $108.28.

A question is made here upon the sufficiency of the second paragraph of the complaint. That paragraph charged that on the 26th day of May, 1877, the plaintiff James N. Shockney, wishing to obtain the loan of $700, and desiring to avail himself of the credit of Moorman, the defendant, at the Winchester bank, procured one Samuel Shockney to make his promissory note to the defendant for the sum of $700, payable at said Winchester bank three years after date, at ten per cent. interest from the time of its execution; that to further secure the defendant in the premises, and to indemnify and save the said Samuel Shockney harmless on account of his having made said note to the defendant, the plaintiffs, on said 26th day of May, 1877, made to the said Samuel Shockney their promissory note for the like sum of $700, also payable three years after date at said Winchester bank, with ten per cent. interest from date, and to secure the payment of such note executed a mortgage on certain real estate belonging to the plaintiff Rachel E. Shockney, to the said Samuel Shockney; that, on the same day, the said James N. Shockney and Samuel Shockney delivered both of these promissory notes herein above mentioned, together with the mortgage executed as above, to the defendant, the last named note being endorsed by Samuel Shockney to the defendant; that the said James N. Shockney thereupon received from the defendant the sum of $630, the latter retaining the sum of $70, as interest paid in advance, and crediting that sum on the note executed by Samuel Shockney to him as interest thus paid in advance for one year; that afterwards, that is to say, on the 28th day of June, 1878, the plaintiff James N. Shockney, through the agency of Samuel Shockney, paid the further sum of $20 on said indebtedness, and, on the 21st day of August, 1878, the further sum of $20, all of which payments were placed as credits upon the note made by Samuel Shockney; that at the time said credits, and each of them, were entered upon the

back of the note executed by Samuel Shockney, it was understood and agreed that like credits should be entered on the note made by the plaintiffs to Samuel Shockney, and held by the defendant as herein above stated; that the defendant failed, neglected and refused to enter said credits, or any one of them, on said last named note; that on the 10th day of May, 1880, the defendant surrendered to Samuel Shockney the note executed by him, and retained only the note and mortgage made by the plaintiffs to secure the payment of the debt then owed by the plaintiff James N. Shockney to him, the defendant, and that, on the day last named, the defendant sold, and, by his endorsement thereon in writing, transferred, to one Margaret Turner, said note and mortgage, without having entered any credits or noted any payments thereon, she, the said Margaret Turner, having no knowledge at the time that any payment had been made upon the indebtedness represented by the note and mortgage so purchased by her; that after the maturity of the note the said Margaret Turner commenced proceedings in the Randolph Circuit Court against the plaintiffs herein, to foreclose the mortgage so transferred to her by the defendant; that the plaintiffs, as defendants in those proceedings, set up the payments which had been made to Moorman, the defendant herein, as above set forth, as a partial defence to the action, but the court refused to allow those payments as credits in favor of the plaintiffs, upon the ground that the note had been negotiated before it became due, and rendered judgment against the plaintiff James N. Shockney for the full amount of the note with interest computed thereon, and entered a decree for the foreclosure of the mortgage against him and his co-plaintiff, Rachel E. Shockney; that the plaintiff James N. Shockney was, at the time, insolvent and without means to pay the judgment so rendered against him, or any part thereof; that the plaintiff Rachel E. Shockney thereupon, as the surety of her said husband, paid and satisfied said judgment by conveying the mortgaged lands to the said Margaret Turner, and without

receiving any credit for the payments on the note which the mortgage was given to secure. Wherefore the plaintiffs averred that the said Rachel E. Shockney had, as such surety, been compelled to pay, and had paid, $110, with accrued interest thereon, more than she ought to have been required to pay, and demanded judgment for $200.

Objections are made to the sufficiency of this paragraph of the complaint: *First.* That it was not directly averred that the money received by James N. Shockney from Moorman was obtained by him as a loan, and that it can not be fairly inferred from the facts as stated that the money thus received by the said Shockney was as a loan. *Secondly.* That it is not made to appear that Moorman was a party to the alleged understanding and agreement that the payments made to him were to be also entered as credits on the note executed by the plaintiffs. *Thirdly.* That there was no averment that Moorman had been requested to enter these payments as credits on the note lastly referred to. *Fourthly.* That it was not charged that Moorman knew that the lands mortgaged to Samuel Shockney were the separate property of the plaintiff Rachel E. Shockney. *Fifthly.* That the value of the mortgaged lands was not stated. *Sixthly.* That the amount which Moorman received from Margaret Turner for the note and mortgage executed by the plaintiffs was not alleged, and that for that reason it was not affirmatively shown that Moorman had received more money than he was equitably entitled to receive upon the note and mortgage.

It is claimed that for these reasons the paragraph under consideration was bad for uncertainty, and that on that account the demurrer to it ought to have been sustained.

The rule may be stated in general terms to be that where facts sufficient are alleged, whether directly or inferentially, to constitute a cause of action, a demurrer will not be sustained because of uncertainty in some of the averments of the complaint. Questions can only be made upon such uncertain averments by a motion to have them made more specific.

A demurrer to a complaint for uncertainty will be sustained only when the uncertainty is so great as to amount to a failure to state a cause of action. Buskirk Pr. 185; 1 Works Pr., section 493.

Tested by this general rule, we think the paragraph before us was sufficient upon demurrer. It contained an averment that the object in procuring Samuel Shockney to execute his note to Moorman was to enable James N. Shockney to obtain a loan, and that the other note and accompanying mortgage were executed in aid of that object. All that afterwards occurred between the original parties to the transaction was consistent with the theory that the money received by James N. Shockney from Moorman came to him as a loan, and the inference that such was the case is fairly deducible from the facts and circumstances charged in the paragraph. If, as the demurrer admitted, both notes were given to secure the same indebtedness, the plaintiffs were entitled to have any payment made upon that indebtedness entered as a credit upon both notes, independently of any understanding or agreement that such payments should be so entered, and it was the duty of Moorman to enter all payments as credits before disposing of either one of the notes, and that, too, without being requested to do so.

It was also quite immaterial whether or not Moorman knew that the mortgaged lands were the separate property of Rachel E. Shockney as the wife of his principal debtor. His duty as to entering all proper credits on the notes was not affected by the question as to whom the mortgaged lands belonged; nor was his duty in that respect affected by the amount which he may have received as purchase-money for the note and mortgage from Margaret Turner. When considered with reference to its essential averments, the *gist* of the paragraph was that Moorman had so demeaned himself, in connection with the transaction described, as to compel the plaintiff Rachel E. Shockney to pay to Margaret Turner, by the conveyance of real estate, over $100 more than she ought

to have been required to pay, and in that view the paragraph made a good *prima facie* cause of action.

It is next and lastly claimed that the damages were excessive. But the evidence is not in the record, and we have, hence, no means of estimating the damages, if any, which the plaintiffs ought to have recovered.

The judgment is affirmed, with costs.

Filed April 22, 1884.

No. 11,200.

Western Union Telegraph Company *v.* Meredith.

Telegraph Company.—*Failure to Transmit Message.—Complaint.—Copy of Telegram.*—In an action against a telegraph company, to recover the statutory penalty for failure to transmit a message, the complaint need not set out a copy of the message.

Same.—*Contract Exempting Company Void.—Limitation.*—A contract between the company and the sender, absolving the former from liability for its negligence, is void, but a contract that claims for such damages must be presented within sixty days after the act complained of is valid.

Same.—*Statute Constitutional.*—The statute of this State making telegraph companies liable to a penalty for failure to transmit, etc., is not in violation of the Federal Constitution.

Same.—*Negligence beyond State Limits.*—Such action lies where the act complained of occurred beyond the limits of this State, if the message was delivered to the company within this State.

From the Decatur Circuit Court.

J. E. McDonald, J. M. Butler and *A. L. Mason*, for appellant.

J. S. Scobey, for appellee.

Elliott, J.—This action is for the recovery of the statutory penalty for a failure to transmit and deliver a message sent by the appellee to a person in Kansas City, Missouri.

The objection urged against the complaint, that it does not set out a copy of the message, is without force. The message is not the foundation of the action, and, therefore, not within the provisions of the statute requiring written instruments to be filed with the pleading.

The answer of the appellant sets forth the contract between the parties, from which it appears that it was expressly agreed that there should be no responsibility for damages, unless a claim in writing was presented within sixty days after the receipt of the message. It is averred that no such claim was presented within the time limited.

In *Western Union Tel. Co.* v. *Jones, post,* p. 228, we gave the question a careful examination and held that a telegraph company might reasonably limit its liability by an express contract, and that a limitation of sixty days for the presentation of claims was a reasonable one. Many authorities were there cited, and we do not deem it necessary to repeat them. A further examination has strengthened our confidence in the correctness of the conclusion there announced, and we have thought it not improper to add to the authorities we there cited. We find the text-writers and courts treating the question as free from doubt. Wharton, Thompson, and Redfield treat the question of the right to contract that claims shall be presented within a limited time as not open to discussion, and confine their discussions to the question whether such a limitation may be imposed by notice. Wharton Neg., section 760; 2 Thompson Neg. 846; Shearman & Redfield Neg., section 569.

Our own cases have uniformly held that common carriers may reasonably limit their liability by express contract. *Western Union Tel. Co.* v. *Jones, supra,* and authorities cited. If common carriers may do this, surely telegraph companies, whose liability has never been so great as common carriers, may do so. In *Western Union Tel. Co.* v. *Buchanan,* 35 Ind. 429 (9 Am. R. 744), this principle is fully recognized, but it was held, as all our cases hold, that the company could not by contract absolve itself from the consequences of its own negligence. The provision in the contract regarding notice was valid, and the court erred in sustaining the demurrer to the answer.

It is settled law that the provision of the contract as to ex-

emption from negligence is without force. The right of recovery is, therefore, not affected by this stipulation. *Western Union Tel. Co.* v. *Jones, supra; Western Union Tel. Co.* v. *Young*, 93 Ind. 118; *Western Union Tel. Co.* v. *Adams*, 87 Ind. 598 (44 Am. R. 776), and authorities cited; *Western Union Tel. Co.* v. *Blanchard*, 45 Am. R. 480, auth. n.

Our statute does not infringe the provisions of the Federal Constitution conferring power upon Congress "to regulate commerce with foreign nations and among the several States," nor does it abridge the freedom of commerce, nor conflict with any law of Congress. *Western Union Tel. Co.* v. *Pendleton, ante*, p. 12. The statute is a valid and effective exercise of the police power inherent in the State.

The right to the penalty given by statute is not defeated by the fact that the act of negligence which constituted the breach of duty occurred beyond the limits of the State. *Western Union Tel. Co.* v. *Pendleton, supra; Western Union Tel. Co.* v. *Lindley*, 62 Ind. 371; *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181; *Carnahan* v. *Western Union Tel. Co.*, 89 Ind. 526; 2 Thomp. Neg. 838. Judgment reversed.

Filed April 22, 1884.

96	96
134	575
95	95
148	127

No. 10,628.

SECOR ET AL. *v.* SOUDER ET AL.

NEW TRIAL.—*Motion and Reasons.*—A motion for a new trial is not complete until the written reasons therefor are filed.

SAME.—*Reasons Filed too Late.—Record.—Supreme Court.*—Where a decision is rendered on the last day of a term of court, and a motion for a new trial then made, but the written reasons are not filed until after the first day of the next term, it is not in time and no question raised by such motion and reasons can be presented to the Supreme Court, on appeal.

SAME.—*Special Finding, Conclusions and Exception.*—Special findings, conclusions of law thereon, and exceptions to such conclusions become part of the record by being entered in the order book, without a bill of exceptions.

Secor *et al.* v. Souder *et al.*

FRAUDULENT CONVEYANCE.—*Consideration.—Husband and Wife.*—Upon a finding of facts that a husband is indebted to his wife, that he has sufficient property to pay all his debts, that he caused certain real estate to be conveyed by the grantor to his wife, that she never after claimed the debt against her husband, and that he had caused such conveyance to be made to her to settle difficulties between him and her, it is not erroneous in the court to conclude that such sale was not fraudulent.

SAME.—*Redemption by Husband, of Wife's Property.*—Where a husband redeems land sold on foreclosure against his wife to satisfy a mortgage thereon existing at the time of the marriage, there is a valid consideration for a conveyance of the land to him.

From the Huntington Circuit Court.

W. H. Trammel and *T. L. Lucas*, for appellants.

J. S. Dailey, L. Mock, L. P. Milligan, J. C. Branyan, C. W. Watkins and *M. L. Spencer*, for appellees.

FRANKLIN, C.—Appellants sued appellees for the possession of certain real estate and to quiet their title thereto.

Appellees answered by a denial, and appellee Robert Souder filed a cross complaint claiming to be the owner of the real estate, and asking to have his title quieted to the same, which was answered by a denial.

There was a trial by the court, and, at the request of appellants, the court made a special finding and stated its conclusions of law thereon.

Appellants excepted to the conclusions of law, and, over a motion for a new trial, the court rendered judgment for the defendants, and for appellee Robert Souder on his cross complaint.

The errors assigned are the overruling of the motion for a new trial, and the exception to the conclusions of law.

Appellees insist that the motion for a new trial is not properly a part of the record, for the reason that it was not filed in time.

The special findings were announced and filed November 12th, 1881, which was the 24th and last day of the October term of said court.

The record shows that appellants then excepted to the con-

clusions of law, and moved the court for a new trial, whereupon the cause was continued until the next term.

On the 3d day of January, 1882, and the 2d day of the January term of said court, appellants filed their reasons for a new trial.

On the 5th day of January, 1882, appellants filed a motion for a *nunc pro tunc* entry showing that the reasons for a new trial were filed on the 2d day of January and 1st day of January term, 1882, which motion the court overruled, and on the 7th day of January, 1882, overruled the motion for a new trial, and rendered judgment upon the special findings and conclusions of law.

Under the R. S. 1876, the motion for a new trial had to be made and the reasons filed at the term at which the trial was had and the decision rendered, unless the same was waived by the opposite party. *Krutz* v. *Craig*, 53 Ind. 561; *Wilson* v. *Vance*, 55 Ind. 394; *Cutsinger* v. *Nebeker*, 58 Ind. 401; *Pennsylvania Co.* v. *Sedwick*, 59 Ind. 336; *Northcutt* v. *Buckles*, 60 Ind. 577; *Trentman* v. *Swartzell*, 85 Ind. 443; *Christy* v. *Smith*, 80 Ind. 573. But the 561st section of the R. S. 1881 provides: "The application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then, on the first day of the next term of such court, whether general, special, or adjourned."

The record shows that the reasons for a new trial were filed after the first day of the next term, and that the motion for a *nunc pro tunc* entry was overruled. No question is presented to this court upon the ruling on the motion for a *nunc pro tunc* entry. Nothing to the contrary being shown, the presumption is the court decided rightly.

An application for a new trial consists of a motion therefor and the filing of the reasons, and the application is not complete until the reasons have been filed. The reasons for

a new trial in this case were not filed in time, and no question is presented for consideration by the motion for a new trial. There is no error in overruling it.

Appellees also insist that the exception to the conclusions of law is also not properly in the record, for the reason that no bill of exceptions embracing it was filed at the time.

Special findings, conclusions of law, and exceptions to conclusions of law properly go into the record by the entries upon the order-book being copied, without a bill of exceptions, the same as verdicts of juries. In this case the exception to the conclusions of law is properly stated in the entry upon the order-book and copied in the record, and, we think, is thereby properly in the record.

The special findings read as follows:

"On the 31st day of August, 1875, Albert Hatfield and the defendant Mary Souder were husband and wife. Prior to that date the said Mary, owning a house and lot, sold the same for $450, and let her husband, Albert Hatfield, have $300 of the money to put in the store. She never relinquished the ownership of the $300 prior to the 31st of August, 1875. On the latter date, in a trade of real estate between Albert Hatfield and one William Hendry, at Albert Hatfield's request Hendry conveyed the real estate described in the complaint to Mary, the wife of Albert Hatfield, which deed was recorded in book 36, page 343, of the records of Huntington county, September 17th, 1875. There was a mortgage amounting to $120 on the property traded by Hatfield owing by him, and to indemnify Hendry, they executed a mortgage to him on the four-acre tract described in the complaint. The mortgage was never paid by Hatfield. The consideration between Hatfield and his wife for said conveyance and adjustment of the differences and difficulties was to keep peace in the family, as he expressed it. She never laid claim to the $300 afterwards. The value of the four-acre tract at that time was $400 or $500. Albert Hatfield was at the time, and ever since has been, insolvent, although for several months after said 31st

day of August he had property enough to pay the plaintiffs' claim against him. On the 31st day of August, 1875, the said Albert Hatfield was indebted to the plaintiffs in an account which about that time was put in a note, which note was put into judgment on the 21st day of March, 1876, in the sum of $250.79, and costs. On the 19th day of July, 1878, an execution was issued on the judgment, and on the 17th day of August, 1878, the four-acre tract was sold thereon to the plaintiffs. A deed was made by the sheriff on that sale to the plaintiffs, on the 12th day of September, 1879, and recorded in book No. 1 of the records of sheriff's sales for said county, at pages 372 and 373. On the 22d day of January, 1880, Albert Hatfield and his wife, Mary, separated, and she married the defendant Robert Souder on the 3d day of February, 1880. The defendants Robert Souder and Mary Souder conveyed said realty to one Charles H. Conwell by quitclaim deed, and the said Conwell immediately conveyed the same by quitclaim deed to the defendant Robert Souder; the said mortgage on said realty was foreclosed by David B. Hoover on the 15th day of October, 1878, and the same was sold by the sheriff to said Hoover on an order of sale issued on said decree, and the equity of redemption was about to elapse and determine; the defendant paid for the redemption of said real estate from sale the sum of $205 at the time of said conveyance, to wit, February 3d, 1880. The said Robert Souder had no actual notice of any claim, lien, or demand or title on, in or to said real estate, except said sheriff's sale to Hoover and a debt claimed by Hoover as being due from Hatfield to him, and for which he and his attorney claimed that said real estate was liable. After the conveyance by Hendry to Mary Hatfield, Albert Hatfield built a house on said four acres, and the property was increased in value thereby to about $700 or $800."

The conclusions of law upon the above statement of facts are:

"That the conveyance of said real estate by William Hendry to Mary Souder, then Hatfield, was not tainted with fraud,

but was for a valuable consideration from Mary to her husband Albert Hatfield, and in good faith, and that said conveyance from Robert Souder and wife to Conwell, and from Conwell to Robert Souder, were for a valuable consideration and in good faith, and are not fraudulent.

"The finding of the court is for the defendants on the issue on the complaint, and for defendant Robert Souder on his cross complaint, and that his title to said real estate be quieted."

While the special findings do not directly state that the consideration for the deed from Hendry to Mrs. Hatfield was the $300 which her husband owed her, we think the facts stated, that he then owed her $300; that he was insolvent, but then had other property sufficient to pay plaintiff's debt, that she claimed the money up to that time, that they had differences and difficulties, and that peace was thereby to be restored in the family, and that she never afterward claimed the $300, are sufficient to warrant the inference, and justify the conclusion of law, that the deed was for a valuable consideration, and was accepted by her in payment of her debt, and not to defraud his creditors. And the facts stated clearly show that the consideration of the deeds from Souder and wife to Conwell, and from Conwell to Souder, was the redemption of the land from the foreclosure sale, thereby securing to the wife an interest in the land, for without such redemption she would have lost all interest therein; and which redemption was sufficient to warrant the conclusion of law that said deeds were executed for a valuable consideration, and without the intention to defraud Hatfield's creditors.

We think there is no error in the conclusions of law.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion that the judgment of the court below be and it is in all things affirmed, with costs.

Filed April 19, 1884.

No. 10,627.

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145 669

BARKLEY ET AL. *v.* MAHON.

PLEADING.—*Argumentative Averments.*—If the necessary facts appear in a pleading argumentatively only, it will resist a demurrer.

SHERIFF'S SALE.—*Execution.—Exemption.—Evidence.—Life-Estate.—Appraisement.—Copy Sheriff's Certificate.*—Suit by an execution defendant to set aside a sheriff's sale of real estate upon the ground that the sheriff had, on proper schedule and proceedings, set apart the same as exempt from execution.

Held, that without proof that the property had been set apart as alleged the evidence was not sufficient.

Held, also, that the schedule made in such case and delivered to the sheriff, describing the property as "a life-estate in a house and two lots in the city of Huntington, Indiana," and being verified by oath showing that the party owned no other real estate, was sufficient, and admissible evidence for the plaintiff.

Held, also, that the execution, advertisement and appraisement of the property scheduled were proper evidence for the plaintiff.

Held, also, that a mere copy of the sheriff's certificate of sale was not proper evidence for the plaintiff; but on proper notice to produce the original to be used as evidence, and failure, parol evidence of its contents would have been admissible.

Held, also, that parol evidence to show that the property was in fact appraised, and to identify it as the same lots described by numbers in the complaint, was admissible for the plaintiff.

SAME.—*Pleading.*—When an officer sells property set apart as exempt from execution, the facts justifying such sale must be specially pleaded by him.

WIDOW.—*Election Under Will.*—A widow, to whom a life-estate is devised in lieu of her interest in her husband's land, manifests her intention to take under the will by claiming such life-estate as exempt from execution.

From the Huntington Circuit Court.

W. H. Trammel and *T. L. Lucas*, for appellants.

J. B. Kenner, *J. I. Dille* and *L. P. Boyle*, for appellee.

COLERICK, C.—This was an action instituted by appellee against the appellants to set aside a sale of certain real estate, made by the appellant Kintz, as sheriff of Huntington county, Indiana, to the appellants Barkley and Hassin, to satisfy a judgment rendered in their favor against the appellee, and enjoin said sheriff from executing to them a deed of conveyance for said real estate.

A demurrer to the complaint, for want of sufficient facts, was filed by the appellants, and overruled, to which ruling they excepted, and filed an answer of general denial. The issues were tried by the court, who found for the appellee. A motion for a new trial was made by the appellants, and overruled, to which ruling they excepted, and thereupon judgment was rendered in favor of the appellee, from which the appellants appeal to this court, and assign as errors the rulings of the court below on the demurrer to the complaint, and the motion for a new trial, which supposed errors we will consider in the order presented.

The complaint, in substance, avers that the appellee is the owner of a life-estate in lots forty-five and forty-six, in Hitzfield's addition to the town of Huntington, which she owns under the last will of her late husband, Stephen Mahon, who was the owner in fee simple of said lots at the time of his death; that she accepted the provisions of said will, and has ever since his death held said life-estate, and now holds the same by virtue thereof; that the appellants Barkley and Hassin, on the 18th day of July, 1881, recovered a judgment against her for $118, on which an execution was issued and placed in the hands of the appellant Kintz, as sheriff of Huntington county, Indiana, who, on the 13th day of August, 1881, levied the same upon property owned by the appellee, who filed with said sheriff a schedule of all her property of every kind, within and without this State, which schedule set forth her interest in said real estate; that upon filing said schedule appraisers were, by the appellants Barkley and Hassin and the appellee, selected to appraise the property mentioned in said schedule, and they appraised the same, under the directions of said sheriff; that said appraisers, under like directions, viewed said real estate, the same being pointed out to them by the sheriff, who well knew the location and description thereof; that the appellee asked to have the same set off to her as exempt from levy and sale on said execution, and under the direction and immediate supervision of

said sheriff, the appraisers appraised her life-estate in said real estate at $300, and it was set off to her as exempt from execution and sale; that at the time said levy and appraisement were made, and said property set off to her as exempt from execution, she was, and has ever since been, and now is, a resident householder of said county; that regardless of said property being so set off to her as exempt, said sheriff, on the 24th day of September, 1881, sold the same, on said execution, to said Barkley and Hassin, to satisfy their said judgment; that appellee was present, by attorney, at said sale, and gave notice to said sheriff and all persons present, that said sale was wrongful and void, and that said property had been set off to her as exempt from said execution; that said sheriff has since then issued to said Barkley and Hassin a certificate of purchase of said real estate, and now threatens to, and will, execute to them a sheriff's deed therefor, unless enjoined from so doing. Wherefore she prayed the court to declare said sale and certificate of purchase void, and perpetually enjoin the execution of a sheriff's deed to said Barkley and Hassin for said real estate, and other relief.

The principal objection urged by the appellants to the sufficiency of the complaint is, that it fails to aver that the judgment upon which the execution issued was rendered for a debt growing out of or founded upon a contract, express or implied. If such an averment was necessary, which we need not decide, it is sufficiently made, argumentatively, as the complaint alleges, that the appellee claimed the benefit of the exemption law, and complied with all of its requirements, and that the property in controversy was set apart to her by the sheriff as exempt from said execution. It has been decided by this court that the effect of setting off property as exempt is to release it from the lien of the execution. *Austin* v. *Swank*, 9 Ind. 109; *Godman* v. *Smith*, 17 Ind. 152; *Hall* v. *Hough*, 24 Ind. 273. It may be fairly inferred from the allegations in the complaint to which we have referred, that the sheriff set apart to the appellee the property as ex-

empt, because she was entitled to the exemption, and that the debt for which the judgment was rendered was founded upon or grew out of a contract, express or implied. An argumentative pleading may be so conclusive as to amount to an express allegation of the facts, when tested by a demurrer, and will not be held bad on demurrer. *French* v. *Howard*, 14 Ind. 455; *Bell* v. *Eaton*, 28 Ind. 468; *Utterback* v. *Terhune*, 75 Ind. 363; *Vance* v. *Schroyer*, 82 Ind. 114. The defect in such pleading can be reached only by motion to make it more certain. *Bell* v. *Eaton*, *supra*; *Vance* v. *Schroyer*, *supra*. In the cases of *Austin* v. *Swank*, *supra*, *Hall* v. *Hough*, *supra*, and *Green* v. *Aker*, 11 Ind. 223, complaints in cases similar to this, where like objections were urged, were held to be sufficient, although the allegations were less certain and specific than in this case.

If an exemption is made by an officer in a case not allowed by law, and he subsequently sells the property, regardless of the exemption, the facts upon which he relies in justification of his act in selling the same should be specially pleaded by him.

The other objections to the complaint are based upon the exhibits filed with the complaint, being the schedule, appraisement and will referred to therein. These exhibits can not be regarded as parts of the complaint, as the action is not founded upon them, or any of them. It is only where a written instrument is the foundation of the action that a copy thereof filed with the complaint becomes part of it. 2 R. S. 1876, p. 73, section 78.

It is settled by the decisions of this court that exhibits filed with a complaint, which are not the foundation of the action, do not become parts of the complaint by being filed with it, and they can not be examined or considered by this court for the purpose of determining the sufficiency of the complaint on a demurrer thereto, alleging insufficiency of facts. See *Cassaday* v. *American Ins. Co.*, 72 Ind. 95, and the many cases there cited. We therefore hold that the com-

plaint was sufficient, and that no error was committed in overruling the demurrer thereto.

The reasons assigned for a new trial were:

1. That the finding of the court was contrary to law.

2. That the finding of the court was not supported by the evidence.

3. Error of law, occurring at the trial, in permitting the appellee to introduce in evidence the schedule of property made by her, and referred to in the complaint.

4. Error of law, occurring at the trial, in admitting as evidence the execution described in the complaint.

5. Error of law, occurring at the trial, in allowing the appellee to introduce in evidence the advertisement of the sheriff's sale mentioned in the complaint.

6. Error of law, occurring at the trial, in allowing the schedule and appraisement, referred to in the complaint, to be given in evidence.

7. Error of law, occurring at the trial, in permitting the appellee to introduce in evidence a copy of the sheriff's certificate of sale, described in the complaint.

8. Error of law, occurring at the trial, in allowing John W. Bonman, a witness for appellee, to testify as follows: "I am deputy sheriff of Huntington county; I made the levy on the property in suit; it is the same property claimed by plaintiff in her schedule; she said she was going to schedule; I was with the appraisers when they made the appraisement."

9. Error of law, occurring at the trial, in allowing the appellee to give in evidence the testimony of Lawrence P. Boyle, as follows: "I am acquainted with the plaintiff, and have been attending to her business for one year last past; I know she has accepted the provisions of the will of her late husband; I made out the schedule referred to in this case; she told me that she had accepted the provisions of said will instead of taking under the law."

We will consider the sufficiency of these reasons in the order in which they are presented in the motion for a new trial.

First. No point is made by the appellants in their brief in support of this reason, therefore, if any exists, it is waived by their failure to discuss or refer to it.

Second. We have carefully examined the evidence set forth in the bill of exceptions, and find that it fails to establish the most important and material averment in the complaint, viz., that the property in controversy had been actually set apart to her by the sheriff before the commencement of the action, as exempt from the execution by virtue of which it was afterwards by him sold. She introduced, or offered, no evidence to prove this averment. In the absence of such proof, which, in view of the averment in the complaint to which we have referred, was indispensable to her right to recover, the finding of the court can not be sustained, and the motion for a new trial, for this reason, ought to have been granted.

The appellants insist that appellee was entitled to, and owned, a greater interest in the real estate set forth in her schedule, than that claimed therein, in this, that as the widow of her late husband she was entitled, under the law, to an interest in fee in said real estate in lieu of the life-estate therein given to her by the will. She had the right to elect whether she would take under the law or the will. *Leach* v. *Prebster*, 39 Ind. 492. The right was a personal one, which she alone could exercise. *Heavenridge* v. *Nelson*, 56 Ind. 90. Her right to make such election, at any time, existed, and lapse of time did not affect it. *Piercy* v. *Piercy*, 19 Ind. 467. An election by her required the performance of some affirmative act on her part indicating her intention to make it. *Wetherill* v. *Harris*, 67 Ind. 452. In this case the evidence shows that the appellee did, by a positive and affirmative act on her part, elect to take under the will, by claiming, as exempt from execution, the life-estate in said real estate, which was given to her by the provisions of the will. So appellants are mistaken when they assert that she had a greater interest than a life-estate in said real estate.

The sheriff had no power to question the correctness of

the schedule, or determine whether or not it was a true and full statement of all her property. *Douch* v. *Rahner*, 61 Ind. 64.

Third. We do not think that the court erred in admitting the schedule in evidence. The objection urged by the appellants is, that it does not sufficiently describe the real estate owned by her, or in which she claimed an interest. It is described as a life-estate in a house and two lots in the city of Huntington, Indiana. We think it is sufficiently described. The schedule, verified as it is by the affidavit of the appellee, shows that the lots therein named constituted the only real estate owned by her, and are described as located in the city of Huntington, Indiana. The appellants knew what real estate was intended to be described by her in the schedule, as the judgment plaintiffs selected an appraiser to appraise the same, and he, with the appraiser selected by the appellee, made the appraisement under the directions of the sheriff. If the description, as set forth in the schedule, was sufficient to enable the officer to discover and identify the property, and cause its appraisement, he, and those for whom he acted, could not afterwards question the sufficiency of the description.

The Constitution of this State declares that "The privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." Article 1, section 22. In view of this just and humane provision of the Constitution, it has been held by this court that statutes enacted to carry it into effect, and all proceedings under them, shall be liberally construed for the benefit of the debtor. *Gregory* v. *Latchem*, 53 Ind. 449.

When the required schedule is furnished by a person entitled to the provisions of the exemption law, to the sheriff or officer holding the execution, he must proceed at once to appraise the property, and when appraised he must set off to

the debtor the property selected by him, not exceeding in value the amount allowed him as exempt. R. S. 1881, section 710; *Douch* v. *Rahner*, *supra*. The act of the officer is ministerial, not judicial. He has no discretion to do or not to do it. The law commands him to do so. *Pudney* v. *Burkhart*, 62 Ind. 179.

It would have been error to have excluded the schedule and appraisement as evidence. It was competent and indispensable evidence to the appellee's right of recovery. *Gregory* v. *Latchem*, *supra*.

Fourth, *Fifth* and *Sixth*. We think that the evidence referred to in these reasons for a new trial was competent and material evidence, for the purpose of proving, or tending to prove, material facts averred in the complaint.

Seventh. We do not think that a mere copy of a certificate of purchase issued by a sheriff for real estate sold by him at sheriff's sale is competent evidence. If it was necessary for the appellee to introduce in evidence, which we need not decide, the certificate of purchase referred to, she could have required the appellants, if it was in their possession or under their control, upon proper notice being given to them, to produce it at the trial, so that it might be introduced in evidence, and if they refused or failed to produce it, parol evidence as to its contents might have been given.

Eighth. The evidence referred to in this reason for a new trial was competent for the purpose of showing that the property described in the schedule was, in fact, appraised, as required by law, and was the same property as that levied upon by the sheriff.

Ninth. The bill of exceptions, which contains all the evidence given in the cause, fails to show that the witness Lawrence P. Boyle testified to any declarations made to him by the appellee as to her accepting the provisions of the will, instead of taking under the law, as stated in the motion for a new trial. The evidence which was rendered by Boyle, as set forth in the bill of exceptions, was competent.

For the reasons above set forth we hold that the court erred in overruling the motion for a new trial, and, therefore, the judgment of the court below must be reversed.

PER CURIAM.—The judgment is reversed, at the costs of the appellee, with instructions to the court below to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Filed Jan. 9, 1884. Petition for a rehearing overruled April 23, 1884.

No. 11,154.

DE PEW *v.* ROBINSON.

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150 10
153 24
95 109
157 184

SLANDER.—*Words Actionable Per Se.*—Where one person charges another with being "an abortionist," the language is actionable *per se.*

SAME.—*Physician.*—Language imputing to a physician ignorance and malpractice in his profession is actionable *per se.*

SAME.—*Evidence.*—*Mitigation of Damages.*—In an action of slander, similar torts on the part of the plaintiff against the defendant can not be proved in mitigation of damages.

SAME.—*Malice.*—*Punitive Damages.*—Where slanderous language is uttered with malice in fact, the plaintiff's recovery is not limited to compensatory damages.

SAME.—*Averment of Special Damages.*—Where language is actionable *per se,* the plaintiff need not allege special damages in order to recover more than nominal damages.

PRACTICE.—*Excusing Juror.*—The action of the court in excusing a competent juror is a matter very much in its discretion, and no error is committed where no injury results.

EVIDENCE.—*Hearsay.*—Hearsay statements are not admissible in evidence, even in mitigation of damages.

SAME.—The statement of a sick person as to the nature and symptoms of the affliction under which he is suffering is always original evidence.

SAME.—*Harmless Error.*—The admission of a harmless statement does not constitute an available error.

From the Noble Circuit Court.

A. A. Chapin and *R. P. Barr*, for appellant.

L. W. Welker and *H. G. Zimmerman*, for appellee.

BEST, C.—This was an action of slander brought by the appellee against the appellant.

The complaint consisted of four paragraphs. The first, second and fourth alleged, in substance, that the appellee was then, and had for a long time been, a practicing physician in Noble county, Indiana, and that appellant, at said county, during said time, charged him, in the presence and hearing of others, with being "nothing but a G—d d——d abortionist," thereby imputing to him the offence of causing the miscarriage of women when not necessary to preserve life, to his damage, etc.

The third averred, in substance, that the appellee then was, and had for a long time been, a practicing physician in said county, and the appellant, for the purpose of injuring him, in a certain conversation in said county, had during said time, in the presence and hearing of divers persons, of and concerning the appellee as a physician, spoken the following false, slanderous and defamatory words: "You G—d d——d son of a b——, look at those you professed to cure you killed; they are in their graves," thereby meaning that the appellee was ignorant and unskilful, and was guilty of malpractice in his profession, to his damage, etc.

A demurrer to each paragraph of the complaint was overruled; an answer in denial and in justification was filed; a reply, trial, verdict and judgment for $300. A motion for a new trial was overruled, and these rulings are assigned as errors.

The appellant insists that the language mentioned in the first, second and fourth paragraphs of the complaint, is not actionable *per se*, and, therefore, neither of these paragraphs was sufficient without the proper colloquium, etc.

Our statute makes it an offence, punishable by fine and imprisonment, for any person to prescribe or administer to any pregnant woman, or to any woman whom such person supposes to be pregnant, any substance whatever, or to employ any instrument or other means, with intent to procure a mis-

carriage, unless such miscarriage is necessary to preserve life. Section 1923, R. S. 1881.

Our statute also provides that whoever deposits in any post-office of this State, etc., any instrument or medicine for procuring abortion, or whoever prints or publishes any account or description of any apparatus for procuring abortion or miscarriage, shall be fined, etc. Sections 1997, 1998, R. S. 1881.

It thus appears that the Legislature has employed the words "miscarriage" and "abortion" as synonymous terms, and that the offence of procuring a miscarriage as defined by statute is the crime of abortion. This being true, we think to charge any one with being an "abortionist" is to charge him with the commission of this offence, and therefore the language is actionable *per se*. This charge was calculated, as we think, to induce the hearers to believe that the appellee had committed the crime of abortion, and this was sufficient to render the language actionable *per se*. *Drummond* v. *Leslie*, 5 Blackf. 453; Townshend Slander, section 117, *n*. The demurrer was, therefore, properly sustained.

The third paragraph was clearly sufficient. The language employed in charging the appellee with ignorance and malpractice in his profession was actionable *per se*, and there was, therefore, no error in overruling the demurrer. Townshend Slander, section 103; 3 Sutherland Damages, 657.

The motion for a new trial embraced several reasons. These will be noticed in the order of their discussion. The first is that the court excused a juror who was otherwise competent, because he was a witness in the cause. This was a matter very much in the discretion of the court. Besides, it does not appear that the appellant was injured, and, therefore, this ruling does not constitute an available error if erroneous.

The next reason for a new trial was the refusal of the court to allow the appellant to testify to a statement which he claimed that one Chappel, then deceased, had made to him immediately before the speaking of the words in the com-

plaint mentioned as to certain statements the appellee had made concerning the appellant's want of skill as a physician. The exclusion of this testimony was, as it seems to us, right. The statement was mere hearsay, and was not admissible in mitigation of damages. The fact that the appellant was angry and excited at the time the language was spoken was shown, and was admissible. The court also offered to allow the appellant to prove that the appellee had made the alleged exasperating statement about appellant, but not by hearsay, and this ruling we think was right.

The appellant also offered to prove that the appellee, during the year preceding the speaking of the words, had visited the appellant's patients and had used derogatory language concerning him as a physician; that these facts had come to his knowledge, and had excited him, etc. Proof of these facts was not admissible. To allow it would simply be allowing one tort to be set off against another, and this is never permitted. This testimony was also properly excluded.

During the confinement of one Artemia McCloughton, who was pregnant with a bastard child, the appellee, who was the attending physician, went to the house of Louisa Braden and procured something enclosed in a paper. After he had gone away Louisa Braden, in response to a question, said to one of appellant's witnesses, that the article enclosed was a catheter used to produce abortion, and the appellee was going to use it upon his patient. This statement the appellant offered to prove, but the court excluded it. This was right. The statement was mere hearsay, made by a third party in the appellee's absence, and he was in no manner bound by it.

Some other testimony of the same character was also properly excluded.

The appellant offered some testimony to show that an abortion had been committed upon Artemia McCloughton, and the appellee in rebuttal called her father, who testified that he found her upon a chair, apparently sick; that she then informed him how she was afflicted; that he sent for the ap-

pellee, who came, saw his daughter, and afterwards, in answer to an inquiry, said to him that his daughter was about to be delivered of a child; that a child was born, and that it lived forty-eight hours. The statement of the daughter and of the appellee to the father are said to be hearsay, and therefore erroneous. The statement of a sick person as to the nature and symptoms of the affliction under which he is laboring is always original evidence, and, therefore, the daughter's statement was not inadmissible.

The appellee's statement, if not admissible, was certainly harmless, and, therefore, there was no available error in its admission.

The court instructed the jury that if they found for the appellee, they were not confined in their assessment to compensatory damages, and refused to instruct them that only nominal damages could be recovered upon the third paragraph of the complaint. Both of these rulings were correct. When slanderous language is uttered with malice in fact, the recovery is not limited to mere compensatory damages, but exemplary damages may be imposed. Nor was the appellee limited to nominal damages upon the third paragraph of the complaint. The language, as before stated, was actionable *per se*, and in such case it is not necessary to allege special in order to recover more than nominal damages. *Swift* v. *Dickerman*, 31 Conn. 285.

This disposes of all the questions discussed, and as there is, as we think, no error in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby, in all things, affirmed, at the appellant's costs.

Filed April 19, 1884.

No. 11,589.

LANGE *v.* THE STATE.

CRIMINAL LAW.—*Notary Public.—Seal need not Contain Name of County.—Attestation of Affidavit.*—The seal of a notary public attesting an affidavit made before him need not contain the name of the county where the notary resides, or for which he was appointed.

SAME.—*Pointing Firearm.—Act of 1883.*—The act of March 5th, 1883, Acts 1883, p. 107, "concerning the use of firearms," makes criminal the pointing of a gun or other firearm at another purposely, whether it be done with wicked intent or in mere foolishness.

SAME.—*Pointing Gun at One Within his Dwelling.*—One who angrily seeks another, who is sheltered in his dwelling, and purposely points a gun at the dwelling-house door, daring him to come out, and threatening to shoot him, is amenable under such statute.

From the Pulaski Circuit Court.

G. Burson, R. L. Mattingly and *H. Burns*, for appellant.

F. T. Hord, Attorney General, *W. A. Foster*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ELLIOTT, J.—The jurat to the affidavit on which the information is founded is thus signed: "B. S. B. Stamats, Notary Public," and is attested by the seal, containing these words: "Notary Public. Seal. Indiana." The contention of counsel is that the affidavit is not sufficient, because not attested by a proper notarial seal. We think the seal does indicate the official character of the officer, and that is all that the statute requires. The statute does not require that the seal shall state the name of the county in which the notary resides or for which he was appointed.

The purpose of the act of 1883 prohibiting one person from pointing a gun or pistol at another is to reach two classes of persons, those who in anger, or with malice, threateningly point such a weapon at another, and those who do so without anger or malice. One class is composed of the wicked, the other of the foolish; in one case the act proceeds from wickedness, in the other from lack of sense.

The evidence in this case shows that the appellant was in-

fluenced by evil motives, and that what was done by him was done in a spirit of revenge. He had made threats against the life of the prosecuting witness, and was intent, as his declarations show, upon doing him serious violence. Influenced by the passions of anger and revenge, the appellant stationed himself within twelve steps of the door of the witness's house, laid his gun upon the fence, pointed it at the door of the house, and called upon the witness to come out, declaring that he wanted to "shoot him dead." The appellant's purpose was a deliberate one, for he remained with his gun pointed toward the door for more than fifteen minutes. In our opinion this evidence made a case within the statute, for its language is very broad and comprehensive. The words of the statute are: "It shall be unlawful for any person over the age of ten years, with or without malice, purposely to point or aim any pistol, gun, revolver, or other firearm, either loaded or empty, at or toward any other person." The word "toward" is one of very comprehensive signification, for it means "in the direction of." The gun of the appellant was certainly pointed in the direction of the prosecuting witness, and the case is, therefore, within the letter of the statute. We do not mean to hold that there must always be a conviction where the case is within the letter of the law; on the contrary we affirm that in many cases there can be no conviction unless the offence is within both the spirit and the letter of the law. In this instance we are clear that the appellant violated both the letter and spirit of the statute; he sought the house of the prosecuting witness with intent to do him harm; he evinced by his declaration this intent, and plainly indicated at whom he meant to and did point the gun; there can, therefore, be no mistake as to the purpose of the appellant; nor can there be any doubt as to the person at or toward whom he pointed the weapon. It makes no difference that the person at whom the gun was directed was separated from the offender by a door or wall. A man in his own house has a right to invoke the aid of the law against one who, with evil intent, keeps watch over his door

with deadly weapon, and insults him with opprobrious epithets, and terrifies or annoys him with challenges to come out of the house. Whether a man is shielded by the doors and walls of his house, or by a window, a curtain or a screen, or not shielded at all, is not material, for no one has a right to point at him a deadly weapon and menace him with death. The statute was intended to punish all who maliciously point such weapons at or toward another, and the fact that the threatened person is sheltered behind a barrier of thin plank, or even a wall of stone, does not relieve the man who does the wrongful act from responsibility. One purpose of the law was to repress the use of weapons to terrify or annoy others for the gratification of evil passions or the accomplishment of unlawful ends.

The view we have expressed disposes of all the questions in the case, for although they are presented in different forms, they are answered by our construction of the statute. Judgment affirmed.

Filed April 23, 1884.

No. 10,738.

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SMITH ET AL. *v.* FLACK.

CONTRACT. — *City.—Construction of Sidewalks.—Assignment of Estimates.—Suit Against Assignor and Assignee for Materials Furnished.—Consideration.—Rescission must be Pleaded.—Want of Consideration must be Pleaded.—Evidence.—Omission of Venue.—Demurrer.—Uncertainty.—Material Man.—Mechanic's Lien.*—S., having entered into a contract with a city to grade and pave certain sidewalks, assigned all his "interest in the estimates for" such "grading and paving," in writing, to H., who agreed therein "to receive the estimates when out and proceed to collect the same and pay all claims for material due for said work." Complaint by F. against S. and H., for material sold by F. to S. and used in said work, and alleging the making of estimates by the city engineer, their delivery to S., his delivery thereof to H., who *proceeded* to collect the same and paid part of F.'s claim, and that F. had notified H. that he, F., accepted his, H.'s, promise to pay.

Held, on demurrer by H., that the assignment of the estimates to H. purport a good consideration for his promise to pay.

Smith *et al.* *v.* Flack.

Held, also, that S. and H. might have rescinded the assignment, but to avail themselves thereof as a defence, they must specially plead it, and, therefore, that the complaint need not negative a rescission.

Held, also, that to avail themselves of want of consideration as a defence, the defendants must specially plead it, and that evidence thereof is not admissible under the general denial.

Held, also, that it was not necessary to allege that the plaintiff had first attempted and failed to collect the debt from S.

Held, also, that the omission of the complaint to state the court in which suit was brought is not presented by the demurrer.

Held, also, that it was not necessary to allege that the material used had been furnished *for* the sidewalks in which it was used. The material man's lien law does not apply.

Held, also, that, after verdict, no question is presented by the demurrer because of the failure to allege that S. had not merely *proceeded* to collect, but had collected the estimates.

SAME.—*Maintenance.—Surety's Right to Maintain Suit Against Principal.*—In such action, the defendants having answered that S. had given bond to the city, with surety, to secure payment of claims for material, that such surety had paid F.'s claim, and that F. had brought this action solely for the benefit of the surety, the plaintiff replied setting out an agreement by the surety with F., to pay him the amount of his claim, interest, costs and attorney's fees if the action was defeated, and, if successful, to pay him the amount of the fees, judgment, costs and attorney's fees.

Held, on demurrer, that the surety had an interest in having the action prosecuted, and, therefore, was not illegally maintaining a suit, that the plaintiff is the real party in interest, and that the reply is sufficient.

SAME.—*Joint Motion in Arrest not Available as to Separate Defendants.—Supreme Court.—Practice.*—In such action, no demurrer having been filed to the complaint by S., and there being no assignment of error questioning its sufficiency, no question as to its sufficiency against S. is presented to the Supreme Court by an alleged error in overruling a joint motion by S. and H. in arrest of judgment.

SAME.—*Amending Complaint After Trial.—Variance.*—It is not error to permit the plaintiff to so amend his complaint as to conform to the evidence, where the defendant has not been misled by the erroneous averment.

SAME.—*Pleading Rejected.—Bill of Exceptions.—Supreme Court.*—Additional pleadings were tendered for filing after issues had been fully formed, were rejected and exception taken, but no time given to prepare and file a bill of exceptions; the party complaining incorporated them at a subsequent term in a bill of exceptions containing alleged error in refusing a new trial.

Held, that such pleadings are not in the record.

From the Superior Court of Marion County.

H. J. Everett, for appellants.

A. C. Ayres and *E. A. Brown*, for appellee.

COLERICK, C.—This action was brought by the appellee against the appellants to recover the value of certain brick furnished to the appellant Smith, and used by him in paving certain sidewalks in the city of Indianapolis, under a contract with the city. The action was tried by the court, and resulted in a judgment against the appellants for $159.13.

The only errors assigned, that have been discussed by the appellants, are:

1. That the court erred in overruling the separate demurrer of the appellant Hammons to the complaint.

2. That the court erred in overruling the demurrer to the second paragraph of the reply to the fifth paragraph of the separate answer of Hammons.

3. That the court erred in permitting the appellee to amend his complaint on the trial of the action.

4. That the court erred in refusing to permit the appellants to file certain additional answers to the complaint.

5. That the court erred in overruling the motion for a new trial.

6. That the court erred in overruling the motion in arrest of judgment.

Under the practice of this court the errors not discussed by the appellants in their brief are to be deemed as waived by them, and, therefore, they will not be considered by us. The ones discussed will be considered in the order above presented.

The complaint was in these words:

"Joseph F. Flack complains of John W. Smith and William H. Hammons, and says that heretofore, to wit, on the 6th day of June, 1881, the defendant John W. Smith entered into certain contracts with the city of Indianapolis, the one for grading and paving with brick the south sidewalk of Michigan street from East street to Massachusetts avenue,

the other for grading and paving with brick the north sidewalk of Buchanan street from East street to Greer street, and that thereafter, to wit, on the 10th day of June, 1881, said John W. Smith and his co-defendant William H. Hammons entered into a certain contract in writing, of which the following is a copy, to wit:

"'INDIANAPOLIS, IND., June 10th, 1881.

"'This is to certify that I have this day assigned to W. H. Hammons all my interest in the estimates for the grading and paving of the south sidewalk on Michigan street from Massachusetts avenue to East street; also on the north side of Buchanan street from East to Greer street, said Hammons to receive the estimates when out, and proceed to collect the same, and pay all claims for material due for said work.

"'Signed, J. W. SMITH.'

"That said John W. Smith delivered said contract to said Hammons, who accepted the same; and the plaintiff further shows to the court that after the assignment by said Smith to said Hammons, he, the said Smith, proceeded in the execution of his said contract to its completion; and that, in the course of his executing said contract, he purchased from this plaintiff brick, which were used in the paving of said sidewalk on Michigan street, to the number of seventeen thousand two hundred, a bill of particulars of which is filed herewith as Exhibit A; and that said Smith purchased from the plaintiff, to be used, and which were used, in said sidewalk on Buchanan street, seven thousand brick, a bill of particulars of which is filed with and made part hereof as Exhibit B; that said Smith undertook and agreed to pay this plaintiff for said brick the sum of eight dollars per thousand, to wit, the sum of one hundred and ninety-three dollars and sixty cents; and the plaintiff further shows to the court that upon the completion of said work, to wit, on the 13th day of July, 1881, said Smith procured estimates to be made by the city civil engineer, and issued to him as required by law, showing the amount due from each lot holder adjoining each of said sidewalks on

account of the construction, and delivered the same to said Hammons, who thereupon proceeded to collect the amounts due thereon, but has wholly failed, neglected and refused to pay this plaintiff for the brick so furnished by him and used in making said pavements, except as follows: On July 21st, 1881, said Hammons paid on account thereof the sum of twenty-five dollars, and thereafter, to wit, on the 5th day of August, 1881, he paid the further sum of nine dollars and forty-seven cents, leaving a balance now due this plaintiff of the sum of one hundred and fifty-nine dollars and thirteen cents; and the plaintiff further shows to the court that since the furnishing of said brick, and prior to the bringing of this action, he had notified the said Hammons that he accepted the benefit of said promise, and demanded payment of said balance, which was refused. Wherefore the plaintiff demands judgment for the sum of two hundred dollars, and all other proper relief."

By the terms of the contract set forth in the complaint, as construed by us, Hammons, in consideration of the assignment to him by Smith of the estimates therein mentioned, which was a valuable consideration, promised to pay all claims for materials used in the construction of the sidewalks specified in the contract. It is well settled by the authorities that a promise, based upon a valuable consideration, made by one person to pay the debt of another, is a valid promise that can be enforced by the person in whose favor it is made, although not a party to the agreement. *Cross* v. *Truesdale*, 28 Ind. 44; *Davis* v. *Calloway*, 30 Ind. 112; *Helms* v. *Kearns*, 40 Ind. 124; *Carter* v. *Zenblin*, 68 Ind. 436; *Fisher* v. *Wilmoth*, 68 Ind. 449; *Rinn* v. *Rhodes*, 93 Ind. 389. It is true, as asserted by the appellants, that the parties to the agreement had the right to rescind at any time before the promise of Hammons had been accepted by the persons in whose favor it was made. If the contract in this case was so rescinded, the rescission would have constituted a good defence to the action, but, in order to make it available as a

defence, it was necessary for the appellants to have specially pleaded it by way of answer. *Davis* v. *Calloway, supra.* The appellee was not required to aver in his complaint that the contract had not been rescinded, as the legal presumption existed that it was still in force. The written agreement on the part of Hammons to pay all claims for materials used in the construction of the sidewalks purported to be based on a sufficient consideration, namely, the assignment of the estimates to him; and, therefore, it was not necessary to allege in the complaint that it was so founded. *South Side, etc., Ass'n* v. *Cutler, etc., Co.*, 64 Ind. 560; *Baker* v. *Board, etc.*, 53 Ind. 497. A written instrument promising to pay money implies a consideration, and if there was none, it is for the promisor to plead and prove the fact. *Beeson* v. *Howard*, 44 Ind. 413; *Philbrooks* v. *McEwen*, 29 Ind. 347. Nothing appearing to the contrary, a contract will be presumed to be made upon a consideration, and a want of consideration must be shown by the party pleading it. *Nelson* v. *White*, 61 Ind. 139. But it can not be proven under the general denial. *Bingham* v. *Kimball*, 17 Ind. 396.

The appellants insist that the complaint was insufficient because it failed to show in what court the action was brought. Although the statute requires such statement, it is only a matter of form, and the want of it, where a cause of action is stated in the complaint, can not be reached by demurrer. See *Lowry* v. *Dutton*, 28 Ind. 473; *Goodall* v. *Mopley*, 45 Ind. 355; *Ewing* v. *Hatfield*, 17 Ind. 513.

It was averred in the complaint that the debt for which the suit was brought was due, and remained unpaid, except certain sums that had been paid thereon by Hammons. It was not necessary to aver, as claimed by the appellants, that any effort had been made to collect the money from Smith, or that any demand had been made on him for it.

It is asserted by the appellants that it was necessary to aver in the complaint that the brick furnished by the appellee were purchased by Smith *for* the streets named in the

contract, as Hammons could not be held liable for brick sold *for* any other street, and afterwards used in paving the streets named in the contract. In support of this assertion the appellants cite the cases of *City of Crawfordsville* v. *Barr*, 45 Ind. 258, and *Crawford* v. *Crockett*, 55 Ind. 220, which involved the construction of a provision of the statute relating to mechanics' liens. It was held by the court, that, to hold the property of a person liable to a lien for the value of material used by his contractor, in erecting a building thereon, the material man must have furnished it expressly for use in such building, the language of the statute being "Mechanics, and all persons performing labor, or furnishing materials *for* the construction or repair of any building," etc., "may have a lien," etc. Where materials are furnished for a building, they are furnished on the credit of the building, and when the statute is complied with a lien is acquired. *City of Crawfordsville* v. *Barr*, *supra*. These cases are not in point, or applicable to this case. The only fair construction that can be given to the terms of the contract sued upon in this case is, as we have already stated, that Hammons was to pay all claims for materials used in the construction of the sidewalks. He was to have the assessments, and in consideration therefor he was to pay for the materials used in the making of the improvements.

The last objection urged by the appellants to the complaint is, that it failed to aver that the estimates had been collected by Hammons, and that the allegation therein that he had "proceeded" to collect the same was insufficient. If the averment as to the collection of the estimates by Hammons was indefinite and uncertain, as asserted by the appellants, the defect was remedied and cured by the finding of the court. As was said by this court in the case of *Pittsburgh, etc., R. W. Co.* v. *Hunt*, 71 Ind. 229, "Uncertainty in pleading can seldom be reached, even by a demurrer thereto for the want of sufficient facts; and after the verdict, whereby it may be said that such defect or objection has been cured or

obviated, it can not be made available, either in arrest or for the reversal of the judgment below. * * * For such a defect in a pleading, the appropriate remedy, under the code, is a motion, addressed to the trial court, for an order requiring the plaintiff to make his complaint or paragraph, or the particular allegation thereof, more certain and specific."

The demurrer to the complaint was properly overruled.

Did the court err in overruling the demurrer to the second paragraph of the reply? The paragraph of the answer to which it was addressed averred, in substance, that Smith had executed to the city his two bonds, with James Hudson as surety thereon, conditioned for the faithful performance of his contracts with the city for the paving of said streets, and for the payment of all materials used in the making of the improvements, and that before the commencement of this action the appellee made a full and complete settlement with Hudson of the claim sued upon, and that by the terms of the settlement, so made, Hudson agreed to pay the claim within a specified time, and that the appellee was to institute and prosecute this action against Hammons to final judgment, and assign the judgment, when rendered, to Hudson; that Hudson was to pay the claim within the time specified, whether the judgment was procured within that time or not, and was to be the owner of whatever judgment the appellee might recover in the action, and was to save the appellee harmless from any liability for costs and attorney fees incurred in the prosecution of the action; that the appellee had or held no claim against Hammons at the time of the commencement of the action, and was not the real party in interest. It was also averred that the agreement so made was reduced to writing, and was then in the possession of the appellee.

The second paragraph of the reply to this answer was founded upon the written agreement between the appellee and Hammons, which was referred to in the answer. The essence of the agreement, a copy of which was set forth in the reply, was embraced in the following provision thereof:

"Now, therefore, it is agreed that said Flack shall employ Messrs. Duncan, Smith & Duncan to institute suit against said Hammons for the recovery of the amount due said Flack for said brick; that Messrs. Ayres & Brown, counsel for said Hudson, shall be associated in said prosecution; that said cause shall be instituted and prosecuted as speedily as it prudently can. The said Hudson is to bear all the expenses of said prosecution, including attorney's fees, and any court or other costs for which said Flack may become liable on account thereof. And if from any cause said Flack shall not be able to maintain said action, then within thirty (30) days after the determination of said suit against him, said Hudson shall pay him the full amount due him for said brick, together with his costs and attorney's fees. And if judgment shall be recovered against said Hammons, and the same has not been paid within thirty (30) days after rendition thereof by said Hammons, then, and in that event, at the expiration of said thirty (30) days, said Flack shall assign said judgment to said Hudson, who shall thereupon pay the full amount thereof, together with his costs and attorney's fees to said Flack."

It is quite clear by the provision of the agreement above set forth that Hudson did not own, or have any interest in, the claim sued upon at the time of the commencement of the action or during its pendency; nor was he to own or have any interest in the judgment that might be rendered thereon except upon the happening of a certain contingency mentioned in the agreement, which might or might not occur. By the averments in the reply, it was shown that the appellee was the real party in interest of the subject of the action, and, therefore, had the right to prosecute the same.

The appellants insist that as the action was inspired and instigated by Hudson, and prosecuted for his benefit, the common law rule or doctrine as to maintenance, which forbids and precludes the prosecutions of such an action, must be applied in this case. We do not think, in view of the fact that Hudson, as the surety of Smith, was lawfully inter-

ested in enforcing the collection of the claim sued upon out of Hammons, who had obligated himself to pay it, that the rule or doctrine contended for is applicable to this case. In Wait's Actions and Defenses, vol. 7, p. 77, it is said: "The common law doctrine as to maintenance has no application to persons who either have any real interest in the suit promoted by them, or who act in the *bona fide* belief that they have. Any interest whatever in the subject of the suit is sufficient to exempt him who gives aid to the suitor, from the charge of illegal maintenance. Whether this interest is great or small, vested or contingent, certain or uncertain, it affords a just reason to him who has such an interest, to participate in the suit of another, who also has or claims some right to the same subject." And in the case of *Board, etc.*, v. *Jameson*, 86 Ind. 154, it was said by this court: "Assuming, for the sake of the argument, and for that purpose alone, that the common-law rule prevails in all its rigor, still the case is with the appellee. We affirm this because the insurance company had an interest in the collection of Jameson's claim, and a party having any interest, direct or remote, immediate or contingent, may rightfully aid in the maintenance of the litigation. * * * Whenever there is an interest, the right to assist in maintaining the suit exists and may be exercised. * * * It would be a harsh rule that would prevent a guarantor or surety from aiding the creditor in his attempt to make the debt off of the principal debtor, and we are glad to say it has no place in our law." The demurrer to the reply was properly overruled by the court.

No error was committed in permitting the appellee to amend his complaint on the trial of the action, which amendment consisted in erasing therefrom the words "Massachusetts avenue," and inserting in lieu thereof the words "Michigan street." Evidently, the amendment was made to conform an allegation in the complaint to the proof that had been adduced. It was an immaterial variance that could not have misled the appellants to their prejudice in maintaining their

defence on the merits, and the court possessed ample power, under the code, to authorize the amendment. R. S. 1881, sections 391 and 392.

The record in this case shows that at the October term, 1881, of the court below, the appellant Hammons tendered and offered to file an additional separate answer to the complaint, consisting of six paragraphs, which was rejected by the court, except the fifth paragraph thereof, and both appellants tendered and offered to file their joint answer to the complaint, which was also rejected by the court. To these rulings of the court, which were made after the issues in the action had been formed, the appellants excepted, but no time was asked or granted to prepare and file a bill of exceptions, so as to properly reserve under the statute the question involved in the rulings of the court. The case was tried and judgment was rendered at the January term, 1882, and a motion was then made for a new trial, and written reasons in support thereof were filed. The motion for a new trial was overruled at the March term, 1882, as well as a motion in arrest of judgment, to which rulings the appellants excepted, and they were granted thirty days to prepare and file a bill of exceptions, which was afterwards filed within the time allowed for that purpose. By the bill of exceptions so filed the appellants endeavored to reserve the rulings of the court in rejecting said additional pleadings, by incorporating therein the pleadings, so rejected, and the rulings of the court in rejecting them. The question arising out of the rejection of these pleadings, which the appellants have so earnestly discussed in their brief, is not properly in the bill of exceptions, and has not been reserved in the manner required by the statute, and for that reason can not be considered by us. A bill of exceptions filed after the term, on time given upon overruling a motion for a new trial, can not embrace matters occurring before the trial, as rulings upon pleadings, or like matters. *Pitzer* v. *Indianapolis, etc., R. W. Co.*, 80 Ind. 569; *Boyce* v. *Graham*, 91 Ind. 420.

The only reasons assigned for a new trial that have been discussed by the appellants in their brief are, that the finding of the court was not sustained by the evidence, and that the court erred in rejecting certain items of evidence, recited in the motion, that were offered by the appellants on the trial of the case. We can not disturb the finding on the weight of the evidence, which is conflicting and tends to sustain the finding. The evidence which was rejected was not competent under the issues that were formed and tried; it merely tended to support affirmative matters of defence that were not specially pleaded, and, therefore, no error was committed in its rejection.

All the questions presented by the appellants in support of their motion in arrest of judgment have been considered and determined by us in passing upon the ruling of the court on the demurrer to the complaint, except the one that the complaint does not state a cause of action against the appellant Smith. We think that the complaint was sufficient as to him; but if it was not sufficient the question as to its sufficiency is not properly before us for consideration. No demurrer to the complaint was filed by Smith, and he has not assigned as error that the complaint does not state facts sufficient to constitute a cause of action against him. The question is not presented by the motion in arrest of judgment, as both of the appellants joined in that motion. If the complaint was sufficient as to either of the appellants, the motion, so far as it relates to the complaint, was properly overruled.

As there is no error in the record, the judgment must be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellants.

Filed April 23, 1884.

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No. 11,241.

FELLENZER ET AL. *v.* VANVALZAH.

SUPREME COURT.—*Appeal.*—*Complete Record.*—*Duty of Appellant.*—Upon an appeal to the Supreme Court, it is the duty of the appellant to produce and file therein a complete transcript of the record, or so much thereof as will clearly show the error of which he complains; otherwise the presumption will prevail that no such error exists.

PRACTICE.—*Answer Rejected.*—*Bill of Exceptions.*—*Supreme Court.*—*Appeal.*—Where a motion to strike out or reject a paragraph of answer is sustained, such paragraph will constitute no part of the record on an appeal to the Supreme Court, unless it is made so by bill of exceptions or an order of court.

BILL OF EXCEPTIONS.—*All the Evidence.*—*Finding.*—*Supreme Court.*—*Weight of Evidence.*—The bill of exceptions must show affirmatively that it contains all the evidence given on the trial, or the Supreme Court will not consider or determine any question which depends upon the evidence for its proper decision, and the finding or verdict will not be disturbed, in any case, merely upon the weight of the evidence.

From the Vigo Circuit Court.

M. M. Joab and *A. M. Black*, for appellants.

T. W. Harper, *W. E. Hendricks*, *W. Mack* and *I. N. Pierce*, for appellee.

HOWK, C. J.—The record of this cause shows that on the 30th day of March, 1882, the appellee, Martha VanValzah, the plaintiff below, filed what is called her substituted complaint against the appellants, Jacob Smock, Alexander Smock, Martha W. Fellenzer, Joseph F. Fellenzer, George W. Fellenzer, Catharine Fellenzer and William H. Fisk, as defendants. Following the copy of this "substituted complaint," as it appears in the transcript, is a foot-note by the clerk to the effect that such substituted complaint, "it seems, is the only complaint on file in this action; the plaintiff seems to have amended it, after it was filed, by interlineations," and it "is the second amended complaint in this cause filed."

In such complaint, the appellee alleged that, on April 10th, 1877, the appellants Jacob and Alexander Smock were the owners of the south forty feet of lot No. 119, in the city,

then town, of Terre Haute, in Vigo county; that on the day last named, Jacob Smock and his wife, then living, but since dead, and Alexander Smock executed a mortgage to Nimrod C. Sparks and Penelope, his wife, on said real estate, to secure the mortgagees, as follows: "That, whereas the mortgagees have this day assumed and agreed to pay a school fund mortgage of $1,000, executed by Jacob Smock and Alexander Smock on certain lands this day deeded to mortgagees; now, whenever the said mortgagees pay the said mortgage, then the mortgagors agree to pay the mortgagees $622;" that such mortgage was duly recorded in the recorder's office of Vigo county, on May 18th, 1877, and within forty-five days after its execution; that said Nimrod C. Sparks died intestate, on the — day of ———, 187–, leaving his wife, Penelope, surviving him; that, upon the death of said Nimrod, all the right, title and interest in said mortgage became vested in said Penelope by law of survivorship; that said Penelope died intestate, on the — day of ———, 187–, leaving the appellee and Margaret C. VanValzah her only heirs at law; that said Penelope left no debts, judgments or other claims, unpaid or due against her estate, and no administrator thereof had been appointed.

And the appellee averred that Penelope Sparks, long before her death, gave the claim in suit to the appellee; that at the time of such gift, suit was pending in the court below, and the said Penelope directed Messrs. Mack and Harper, her attorneys, to pay the proceeds when collected to appellee, as she, Penelope, had given her such claim; that, on December 21st, 1881, the said Margaret C. VanValzah assigned in writing to the appellee all her right, title and interest in said mortgage, and that the appellee was then the sole owner of said mortgage.

And the appellee further averred, that on the 3d day of September, 1877, the said Jacob Smock and Caroline, his wife, and Alexander Smock conveyed said mortgaged prem-

ises to one Joseph F. Fellenzer; that, on March 22d, 1879, said Joseph F. Fellenzer died intestate, leaving as his sole heirs at law Martha W. Fellenzer, his widow, and Joseph F. Fellenzer, George W. Fellenzer and Catharine, his wife, and John Fellenzer, his children; that, on the —— day of ——, 18—, John Fellenzer died unmarried and without issue, leaving his said mother and brothers as his only heirs; that when said Joseph F. Fellenzer, Sr., purchased the said mortgaged premises, he had full notice of the mortgage in suit; that the said Penelope Sparks, on April 12th, 1881, fully paid and discharged the school fund mortgage, described in the mortgage sued upon; and that the said Penelope Sparks, in her lifetime, on April 12th, 1881, demanded of the appellants payment of the said sum of $622, but such payment was refused; and that the said sum of $622 was then due and remained wholly unpaid. The appellant William H. Fisk was in possession of the mortgaged premises, as tenant, but his rights were junior to appellee's claim. Wherefore, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee, the plaintiff below, in the sum of $680, and a judgment and decree were rendered for the foreclosure of the mortgage in suit, and the sale of the mortgaged premises.

The defendants Jacob Smock, Alexander Smock and William H. Fisk, upon notice of this appeal by their co-defendants, decline to join therein. The appeal is prosecuted by, and in the names of, Martha W. Fellenzer, George W. Fellenzer, Catharine Fellenzer and Joseph F. Fellenzer, as the only appellants, and they have here assigned errors, as follows:

"1. The second amended complaint does not state facts sufficient to constitute a cause of action.

"2. The court erred in overruling the demurrer to the complaint.

"3. The court erred in striking out the second paragraph of the defendants', the Fellenzers', answer.

"4. The court erred in overruling the motion for a new trial."

Appellants' counsel begin their brief of this cause, as follows: "The first ground assigned as error by appellants is that the second amended complaint does not state facts sufficient to constitute a cause of action. The record recites, that the plaintiff files her second amended complaint. The only pleading on file, purporting to state her cause of action, is her substituted complaint. To this, appellants demurred, and the court sustained the demurrer, with leave to amend. The pleading having been thus disposed of, without exception, is out of the record; and the statements of the clerk will not cure the error."

If we should adopt the view thus taken by appellants' counsel of the record of this cause, and the appellee's counsel seem anxious that we should do so, what then would follow? Simply, and of necessity, the affirmance of the judgment. In this court, every presumption is indulged in favor of the decisions of the trial court, and the burden is upon the appellant to overcome such presumptions. It is not enough merely to allege or assign error, but, in every case, the appellant must clearly *show* the particular error upon which he relies for the reversal of the judgment. If he should claim as error, as in this case, that the complaint does not state facts sufficient to constitute a cause of action, or that his demurrer to the complaint was erroneously overruled, it will avail him naught to assert, or even prove, that such complaint "is out of the record." In such case, where such error is relied upon, it is incumbent on the appellant to produce the complaint, which he claims to be insufficient, in the transcript of the record filed by him in this court; otherwise the error upon which he relies will not be shown by the record, and of course will not be available for the reversal of the judgment.

In the case in hand, it is better for the appellants that we adopt the suggestions of the clerk's note and conclude, as we

do, that the appellee's complaint, of which we have given the substance, was the only complaint in the action, and is the one the sufficiency whereof is called in question by the first two errors assigned by the appellants. The appellants' counsel, however, have wholly failed in their brief of this cause to point out any defect in the appellee's complaint, or any objection thereto, either in form or substance. Under the well established practice of this court, therefore, the first two errors assigned by the appellants must be regarded as waived. *Irwin* v. *Lowe*, 89 Ind. 540.

The third error assigned by the appellants is the action of the trial court in striking out the second paragraph of their answer. After this paragraph of answer was struck out by the court, it was not brought back into the record of this cause, either by a bill of exceptions or by an order of court. Therefore, the third error complained of by the appellants presents no question for decision. *Stott* v. *Smith*, 70 Ind. 298; *Dunn* v. *Tousey*, 80 Ind. 288; *Peck* v. *Board, etc.*, 87 Ind. 221.

In presenting the fourth and last alleged error of the court, namely: The overruling of the motion for a new trial, the appellants' counsel expressly limit their argument to the first four causes assigned for such new trial. The fifth cause for a new trial, therefore, is regarded as waived.

The first four causes for a new trial were, that the finding of the court was contrary to the evidence, was contrary to law, and was not sustained by sufficient evidence, and that the damages assessed by the court were excessive. It is manifest that the questions presented by each of these four causes for a new trial are wholly dependent for their proper decision here upon the presence in the record of *all* the evidence given in the cause. It is earnestly insisted by appellee's counsel, that the record wholly fails to show *what* evidence was given in the cause, or that it contains *all* the evidence so given. Each of these objections to the record of this cause seems to be well taken. The bill of exceptions, which appears in the transcript and purports to contain the evidence,

begins with the prefatory statement, "that, on the trial of this cause, the plaintiff, to sustain the issues on her part, *offered* the following evidence to wit," etc. Then follows a mixture of what seems to have been the oral testimony of divers witnesses, and certain documentary evidence. The bill of exceptions then states, that "the defendants Fellenzers, to sustain the issues on their part, *offered* the following evidence, to wit," etc.; and this statement is followed by what we may suppose to have been the oral testimony of several witnesses. But the bill of exceptions fails to show, in any manner, how much, if any, of the testimony or evidence so *offered* by the parties respectively was either admitted or excluded by the court trying the cause; and therefore it is claimed that the record fails to show upon *what* evidence the cause was tried and the finding made.

In *Goodwine* v. *Crane*, 41 Ind. 335, it was stated in the bill of exceptions, that "The following was all the evidence *offered*;" and this was followed in the record by what purported to be the evidence. It was held, that the evidence was not in the record. Of "the evidence *offered*," the court said: "How much of it was admitted is not shown." See, also, *Sidener* v. *Davis*, 69 Ind. 336; *Woollen* v. *Wishmier*, 70 Ind. 108; *Baltimore, etc., R. R. Co.* v. *Barnum*, 79 Ind. 261.

Waiving this point, however, if it be conceded that, on its face, the bill of exceptions purported to contain "all the evidence given in the cause," yet, if it affirmatively appears in the body of such bill, as it does in this case, that all the evidence given in the case is not in fact contained therein, the Supreme Court will not consider or determine any question which depends, for its proper decision, upon the evidence. *Railsback* v. *Greve*, 58 Ind. 72; *Brownlee* v. *Hare*, 64 Ind. 311; *Hammon* v. *Sexton*, 69 Ind. 37; *Fouty* v. *Morrison*, 73 Ind. 333; *Morris* v. *Stern*, 80 Ind. 227; *French* v. *State, ex rel.*, 81 Ind. 151; *Shimer* v. *Butler University*, 87 Ind. 218.

Again, if this last point be waived, there is evidence in the record which tends to sustain the finding of the trial court

on every material point. In such a case, we have uniformly held that we will not disturb the finding or verdict, nor reverse the judgment, upon what to us might seem to be the weight of the evidence. *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73; *Cornelius* v. *Coughlin*, 86 Ind. 461; *Webb* v. *Zeller*, 90 Ind. 445. The finding of the trial court was not contrary to law, and the damages assessed were not excessive.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

Filed April 18, 1884.

No. 10,011.

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MOORE ET AL. *v.* BOYD ET AL.

PRACTICE.—*Harmless Ruling on Demurrer.—Supreme Court.*—Error in sustaining a demurrer to a paragraph of a pleading is not available, where the facts alleged therein are admissible in evidence under a remaining paragraph.

PROMISSORY NOTE.—*Want of Consideration.—Pleading.*—In an action on a promissory note, a plea that, as to all in excess of a certain part of the note, it "was given without any consideration therefor," is sufficient.

From the Hancock Circuit Court.

R. A. Black, for appellants.

M. Marsh and *J. H. Mellett*, for appellees.

FRANKLIN, C.—Appellees sued appellants upon two promissory notes. Appellants answered in eight paragraphs. The first three were limited to the first paragraph of the complaint, and consisted of payment, want of consideration, and usury. The other five paragraphs, except the fifth, which was general, were to the second paragraph of the complaint, and all of them, except the fourth, pleaded usury. The fourth pleaded a want of consideration as to a part of the note.

A demurrer was sustained to the third, fourth and eighth

paragraphs of the answer, and overruled as to the others, except the fifth, to which there does not appear to have been any ruling made upon the demurrer, and a reply in denial was filed.

There was a trial by jury, verdict for the plaintiffs for $900; a motion for a new trial was overruled, and judgment rendered upon the verdict.

The errors assigned are the sustaining of the demurrer to the third, fourth, fifth and eighth paragraphs of the answer, and the overruling of the motion for a new trial. There is no available error in sustaining the demurrer to the third and eighth paragraphs of the answer, nor to the fifth, if that had been included, for the reason that the same facts were more fully stated under the other paragraphs of the answer to which the demurrer was not sustained.

But it is insisted that the court erred in sustaining the demurrer to the fourth paragraph of answer. That paragraph reads as follows: "For joint and several answer to so much of plaintiffs' claim set forth in the second paragraph as exceeds the sum of $665, defendants say that the note in suit, as to such excess, was given without any consideration therefor." The note in suit in this paragraph was for $805.

Want of consideration is a good defence, and may be pleaded generally, while failure of consideration, to be good, must be pleaded specifically; and want of consideration may be pleaded to a part, as well as the whole, of the cause of action, when limited to that part. *Webster* v. *Parker*, 7 Ind. 185; *Manly* v. *Hubbard*, 9 Ind. 230.

This fourth paragraph of answer was a good defence to that part of the note to which it was pleaded, and the fact therein contained was not embraced in any other paragraph of the answer, and was not provable under any other paragraph to which the demurrer was overruled or not sustained. It was, therefore, error to sustain the demurrer to it, and we do not think that it can be considered a harmless error.

As to the motion for a new trial, the reasons stated are de-

pendent upon the evidence. The bill of exceptions was not filed in time, and the evidence is not properly in the record; therefore we decide nothing in relation to the motion for a new trial.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded to the court below, with instructions to overrule the demurrer to the fourth paragraph of answer, and for further proceedings.

Filed Feb. 22, 1884. Petition for a rehearing overruled April 25, 1884.

No. 8296.

KITSON, ADMINISTRATOR, *v.* HILLABOLD.

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153 144 EVIDENCE.—*Admissions.*—*Estoppel.*—*Former Adjudication.*—*Partnership.*—Suit between partners for an accounting, etc.; it appearing that the funds of the firm came to the hands of the defendant, he offered to prove that $225 thereof which he handed to the plaintiff for a partnership use the latter admitted he had used for himself. It appeared that the defendant and another, as partners, had before sued the plaintiff for this $225 and failed to recover it. The evidence offered was rejected. *Held*, that this was error.

From the Kosciusko Circuit Court.

J. S. Frazer, *W. D. Frazer* and *S. J. North*, for appellant.

R. B. Encell and *H. S. Biggs*, for appellee.

BLACK, C.—This was a suit brought in 1877 by the appellee against Adam Ketsing. The complaint showed that in 1874 the plaintiff and the defendant entered into a copartnership in the business of purchasing, manufacturing and selling to a certain railroad company railroad ties; that they were equal partners in said business, sharing equally in profits and losses; that the firm purchased, manufactured and sold to said company ties to the amount of $6,113.24, which was

received by the defendant, who also received $300, borrowed by him, for the firm, of a person named; that the plaintiff manufactured and furnished ties to the amount of $965.60, for which said firm was indebted to him; that the defendant manufactured and furnished ties to the amount of $320, for which the firm was indebted to him; that the firm purchased ties to the amount of $3,332.14, which the defendant paid out of the money so received; that the balance of said money so received remained in the hands of the defendant; that said firm ceased to act and transact business in October, 1874; that the defendant had held and used all the balance of said partnership money for his own private purposes from that time, refusing to settle with the plaintiff, though he had demanded settlement; that all the property of the firm was disposed of, and all its debts were paid, except said debt of $300, and the defendant had all the money of the firm; that he had ample funds of said firm with which to pay said debt, and had so had at all times since October, 1874, but he refused to pay it, for the express purpose of preventing a settlement of the business of the firm; that the plaintiff could not write, and could keep accounts only by memory; that all the books, papers and accounts of said firm were in the possession of the defendant, or under his control as a member of another firm, named, and the plaintiff could not give a more detailed statement of the business of the first mentioned firm; that, on a fair and reasonable settlement of the business of the partnership, there was due the plaintiff $1,500. Prayer for an accounting, and for judgment against the defendant for one thousand dollars, and for all proper relief.

There was an answer in two paragraphs, the first being a general denial. In the second paragraph it was alleged that in April, 1876, there was between the plaintiff and the defendant an accounting, and a full settlement and adjustment of the partnership accounts.

A reply in denial was filed, and the cause was tried by a jury. The verdict was for the plaintiff, and, among other things,

the jury found that the defendant had in his hands $1,651.70, as the proceeds of the business of said firm, and that the sum of $950 was due from the firm to the plaintiff, and should be paid to him out of said sum in the hands of the defendant. A motion for a new trial was overruled, and judgment was rendered for the plaintiff.

After the cause had been brought to this court, but before it was submitted, the defendant, who was the appellant, died, and a suggestion of his death and of the appointment of Isaac Kitson as the administrator of his estate having been made, the appeal has been prosecuted by said administrator.

On the trial, it having been proved that a large amount of money of the firm had been received by the defendant, and the plaintiff having testified that he had received no money from the firm, and the defendant having testified that he gave the plaintiff, when on a certain occasion he went to Fort Wayne, two hundred and twenty-five dollars of partnership funds with which to buy certain timber, which the plaintiff testified he bought upon his own credit, the defendant, testifying as a witness in his own behalf, was asked by his counsel: "What did Hillabold tell you, when he returned from Fort Wayne, that he had done with the $225 which you had given him of partnership funds with which to buy the Bowser or Fort Wayne land?" The plaintiff having objected to this question, counsel for the defendant stated that they expected to prove by the answer to this question that the plaintiff stated that he had applied the $225 to uses of his own. The court sustained the objection.

It is manifest from what has gone before that this offered evidence was relevant and material. It would seem that it was excluded because it was admitted by the defendant's counsel, "that a claim of $225, for this money, was included in the charges in the account of Silas L. Ketsing & Co. against Martin Hillabold in a suit by them against said Hillabold, and that the court did not allow said $225 to said Silas L. Ketsing & Co. in that suit."

Kitson, Administrator, *v.* Hillabold.

The firm of Silas L. Ketsing & Co. was a firm engaged in mercantile business, and was composed of the defendant and his son. It might well be that the evidence which would uphold a claim for this sum as having been drawn by the plaintiff from the firm composed of the plaintiff and the defendant, or which would establish an indebtedness of the plaintiff to the defendant for that amount, would not support a claim of the defendant jointly with his son against the plaintiff for the same money. Though in a former action, to which the plaintiff and the defendant were parties, it had been adjudged that the receipt by the plaintiff of this sum of $225 did not create an indebtedness of the plaintiff therefor to the defendant and his son jointly, this did not estop the defendant from asserting in this action a claim against the plaintiff for the same sum of $225. The fact that the same evidence which in this suit was offered in reference to said sum of $225 was introduced in support of a claim for that sum in a former action, of which the parties to this action were parties, could not make the former adjudication an estoppel if the evidence relevant to the issues in this suit was not relevant to the issues in the former suit; and the evidence here rejected could not have supported a joint claim of the defendant and his son against the plaintiff. *Lawrence* v. *Vernon*, 3 Sumner, 20.

There certainly was error in the rejection of this offered evidence, and, as it does not appear that the error did not injure the defendant, it must work the reversal of the judgment. As a new trial must be granted, we will not express an opinion upon the evidence. Other questions mooted in the briefs, so far as raised in the record, are not such that they will probably arise again.

Per Curiam.—It is ordered, upon the foregoing opinion, that the judgment be reversed at the appellee's costs.

Filed Feb. 14, 1884. Petition for a rehearing overruled April 25, 1884.

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No. 11,432.

Behymer *v.* The State.

Criminal Law.—*Assault with Felonious Intent.—Instruction.*—Upon an indictment for assault and battery with intent to commit murder, there may be conviction of assault and battery with intent to commit murder in the second degree, or voluntary manslaughter, or there may be a conviction for an assault and battery only, and to instruct that if no felonious intent be proven, conviction may be of *such* assault and battery if the evidence warrants it, can not mislead the jury.

Instructions.—That an instruction is not more specific, is no valid objection to it if it contain a correct general statement of the law.

Same.—*Exceptions.—Practice.*—An exception to an instruction taken under section 535, R. S. 1881, which is not dated, presents no question in the Supreme Court.

Same.—*Self-Defence.—Modifying Instructions.*—An instruction was asked to the effect that a party assailed may take life to avoid *very considerable* bodily harm. The court modified this by the use of the word "great" instead of "very considerable."

Held, no error.

From the Grant Circuit Court.

A. Steele and *R. T. St. John*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

Zollars, J.—Appellant was convicted and sentenced to two years' imprisonment in the State's prison, upon a charge of assault and battery with intent to kill the prosecuting witness. A reversal of the judgment is sought upon the insufficiency of the evidence, and the giving and refusing of instructions.

It should not be understood from the rule and rulings of this court, which forbid the reversal of judgments on the weight of the evidence, that the court does not examine the evidence. In every case where a question is made which requires a reference to the evidence, or where a question is made upon the evidence, it is carefully examined. This is necessary to enable us to say that the evidence does, or does not, tend to sustain the verdict. When, from such examination, it is ascertained that the evidence does thus tend, the rule applies, and the judgment will not be reversed.

The reason of the rule need not be repeated to the experienced counsel conducting this appeal. In the case in hearing we have examined the evidence carefully, and can not, under the rule, reverse the judgment for the want of sufficient evidence.

The substance of the fourth instruction given by the court is, that the felonious intent must be proved beyond a reasonable doubt; that it may be inferred from the facts and circumstances of the case, if the circumstances relied upon are proved beyond a reasonable doubt, necessarily warrant such inference, and are not capable of any reasonable explanation consistent with appellant's innocence.

The objection urged against this instruction is, that it does not more specifically inform the jury as to what circumstances should be considered. As against appellant, the instruction contains no erroneous statement of the law. As to whether or not it was erroneous as against the State, see *Wade* v. *State*, 71 Ind. 535; *Garfield* v. *State*, 74 Ind. 60.

If appellant desired a more specific instruction, he should have prepared one and requested the court to give it. *Powers* v. *State*, 87 Ind. 144, and cases cited.

The seventh instruction by the court, of which complaint is made, is as follows: "The defendant is charged with assault and battery with intent to commit a felony. If all the evidence in the case, taken together, does not prove such felonious intention beyond a reasonable doubt, you may consider whether the defendant has been proven guilty of such assault and battery beyond a reasonable doubt. Assault and battery is defined as follows, to wit: Whoever, in a rude, insolent or angry manner, unlawfully touches another, is guilty of an assault and battery."

The objection urged against this instruction is, that it was calculated to mislead and confuse the jury by the use of the word "such," in connection with the words "assault and battery," and does not contain the further charge, that, in the absence of the felonious intent, there might be a conviction of an assault and battery, if warranted by the proof.

We do not think this objection well taken. This instruction should be considered in connection with the tenth, given by the court. In this the jury were instructed as to the statutory penalty, if they found appellant guilty of assault and battery with intent to commit the felony, and as to the statutory penalty, if they should convict him of assault and battery. From these instructions the jury could, and doubtless did, readily understand that they might convict appellant of a simple assault and battery, and inflict the penalty prescribed for that offence. There was nothing in the use of the word "such," we think, to either mislead or confound the jury. As used in the instruction, "such assault and battery" very plainly meant the assault and battery, without the felonious intent.

Appellant asked the court to instruct the jury that an assailed party may defend himself, and take the life of his assailant, if an attack is made upon him with an intent to do him "very considerable" bodily harm. The court refused the instruction as asked, but gave it with the word "great," instead of "very considerable." The court did not err in refusing the instruction as asked, nor in making the modification. *McDermott* v. *State*, 89 Ind. 187, and cases cited.

No exception was properly saved to the refusal to give the ninth instruction, An effort was made to save the exception in the mode prescribed in the civil code. Whether an instruction, and an exception to the refusal of it, can be brought into the record in a criminal case, in the mode prescribed in the civil code, we do not now decide. In this instance, the requirement of that code was not complied with. There is an exception upon the margin of the instruction, signed by the judge, but it is not dated, as required by section 535, R. S. 1881. Under this section, the date is quite as material as the signature of the judge, *first*, because they are both required by the statute; and, *second*, because it is the date that shows when the exception was taken. It takes the place of the statement in a bill of exceptions, that the exception was taken at the time. There is no exception to this refusal saved

in the bill of exceptions, as counsel for appellant seem to think, nor is the instruction set out in the bill. Upon a relative question, see *McCammack* v. *McCammack*, 86 Ind. 387.

It is further contended, that the court below erred in instructing the jury, that, under the charge of assault and battery with intent to commit murder, appellant might be convicted of an assault and battery with intent to commit murder in the second degree, or voluntary manslaughter, or of an assault and battery alone, if warranted by the evidence. Counsel admit that the cases of *Gillespie* v. *State*, 9 Ind. 380, and *State* v. *Throckmorton*, 53 Ind. 354, support the instruction, and ask that these cases be overruled. These cases have become the settled law of the State. They have been frequently cited and approved. The same doctrine has been reasserted in later cases. See *State* v. *Hattabough*, 66 Ind. 223; *State* v. *Murphy*, 21 Ind. 441; *Powers* v. *State*, *supra*.

The second instruction asked by appellant, and refused by the court, is as follows: "The defendant can only be convicted upon proof that he did, without excuse, commit the assault and battery upon the said Richardson, with the felonious intent to take his life."

Without noticing other objections urged by counsel for the State, it is sufficient to say that the instruction is erroneous, because it amounts to a direction to the jury that, unless the proof showed the appellant to have committed the assault and battery with intent to kill, he should be acquitted. As we have seen, the law is settled in this State, that under the charge preferred against appellant, he might have been acquitted of the felonious intent, and convicted of an assault and battery.

As we find no available error in the record, the judgment is affirmed with costs.

Filed Feb. 21, 1884. Petition for a rehearing overruled April 25, 1884.

No. 11,218.

95 144
135 304

MONTGOMERY ET AL. *v.* AYDELOTTE.

TAX SALE.—*Limitation of Fifteen Years.*—An action to enforce a lien acquired upon land by purchase thereof at tax sale is barred if not commenced within fifteen years after the right of action accrues.

SAME.—*Statute Runs from Right to Deed and not from Date.*—Such right of action accrues and the statute begins to run, not from the date of the tax deed, but at the time when the purchaser becomes entitled to his deed, and delay in obtaining such deed does not extend the time.

SAME.—*Taxes Subsequently Paid Relate Back.*—All taxes subsequently paid, and the right of action therefor, relate back to the time when the purchaser became entitled to his deed.

From the Harrison Circuit Court.

L. Jordan and *S. J. Wright*, for appellants.

W. N. Tracewell and *R. J. Tracewell*, for appellee.

HAMMOND, J.—The appellee, in the second paragraph of his complaint, which was held good upon demurrer, sought to recover possession of real estate under a tax conveyance; or, if the conveyance was ineffectual to convey title, to have his tax lien foreclosed. Answer in two paragraphs: 1. General denial; 2. The fifteen years' statute of limitations. Reply in denial of the special paragraph; trial by the court; finding against the appellee upon the question of title, but in his favor as to his tax lien; and judgment on the finding over the appellants' motion for a new trial and exceptions.

The court below rightly decided that neither the appellee's complaint nor the evidence was sufficient to show a valid title in him under the tax deed. The important question in the case is whether the appellee's action was barred by the statute of limitations.

We think it was correctly held in *Brown* v. *Fodder*, 81 Ind. 491, and *Bowen* v. *Striker*, 87 Ind. 317, that an action to enforce a lien acquired upon real estate by purchase at tax sale is barred if not commenced in fifteen years after the cause of action accrues. See, also, *Caress* v. *Foster*, 62 Ind. 145.

The facts in the present case are as follows: The real estate

upon which the lien is attempted to be enforced was purchased at tax sale by Hugh Dyer, on February 2d, 1863. Dyer assigned the certificate of purchase to the appellee, to whom the county auditor executed a tax deed on November 6th, 1866. The appellee paid all taxes assessed against the land after the tax sale and up to and including the year 1874. This action was commenced on August 18th, 1881.

The tax laws of this State since 1852 have provided that if lands sold at tax sale were not redeemed by the owner within two years after the sale, the county auditor should execute to the purchaser a conveyance. Sections 166 and 168, 1 G. & H. 108; sections 222 and 224, 1 R. S. 1876, pp. 122–3; sections 6479 and 6480, R. S. 1881. These laws have also provided that "If any conveyance for taxes shall prove to be invalid, and ineffectual to convey title, * * * the lien which the State has on such lands, shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest and penalty, legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof." Section 173, 1 G. & H. 111; section 229, 1 R. S. 1876, p. 124; section 6488, R. S. 1881. Sections 256 and 257, 1 R. S. 1876, p. 129, provided that the grantee in a tax deed, when it was not sufficient to convey title, might enforce his lien for taxes in an action brought by or against himself to quiet title to, or to recover possession of, the land. Substantially the same provisions are contained in the present tax law. Sections 6496–7, R. S. 1881, as amended in Acts of 1883, pp. 95–6.

The right to enforce a lien for taxes is derived entirely from statute. From the statutory provisions above referred to we think that this right does not exist until the purchaser at tax sale obtains a conveyance from the county auditor. The owner of lands sold for taxes has two years in which to redeem, and

during that time is protected from an action to enforce the tax lien. The cause of action, then, to enforce the lien, accrues at the expiration of two years after the tax sale, and from that time the statute of limitations commences to run. Delay in obtaining the tax deed will not postpone the time when the statute commences to run.

The appellee was entitled to a tax deed on February 3d, 1865, and might, by procuring such deed, have then commenced his action. As it was not commenced until August 18th, 1881, which was more than fifteen years after his right of action accrued, it was barred by the statute of limitations.

The fact that the appellee annually paid taxes on the land up to 1874 did not extend the time for bringing suit. The statute gave him a lien for taxes paid after the tax sale, but this was to protect the lien created by the tax sale and conveyance. The amount of each payment of taxes after the sale attached to, and became a part of, the first cause of action, but did not form a separate and distinct cause of action.

The conclusions reached in *Brown* v. *Fodder*, *supra*, were correct, but so much of the opinion in that case as intimates that the statute of limitations commences running from the date of the tax sale, instead of two years thereafter, is not approved. In that case, as was rightly held, the action was barred, for, as was said in the opinion, "Whether * * * the statute of limitation be regarded as having commenced to run from the date of the sale, or from the end of two years thereafter, when the appellant might have claimed his deed, the period had fully run, and the appellants' rights were barred * * * before the commencement of the action."

Judgment reversed, at appellee's costs, with instructions to the court below to sustain the appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

Filed April 24, 1884.

No. 10,472.

HARSHMAN *v.* HEAVILON.

CONTRACT.—*Construction of.*—*Sale of Land.*—*Consideration Shown by Parol.*—*Pleading.*—The mortgagor of certain land, the mortgagee, and another lien-holder entered into a written agreement providing that the mortgagee should purchase said lien-holder's claim; should foreclose his own mortgage and procure title thereunder; should pay off certain other liens; should convey a specified portion of the land to the mortgagor's wife, and should pay a certain sum, less said liens and mortgage, to the mortgagor, upon his conveying the mortgaged premises to the mortgagee, free. In an action by the mortgagor against the mortgagee, on said agreement, alleging performance by the plaintiff, the defendant alleged performance by him, but averred that the holder of another lien, which plaintiff had agreed to pay, had redeemed from defendant's purchase at foreclosure; that plaintiff had failed to pay off such other lien, and, therefore, could not make to the defendant a good title.

Held, on demurrer, that the answer is good, that the consideration of the agreement might be shown by parol, and that defendant's written agreement to make certain payments only excludes the idea that he was to make other payments.

From the Clinton Circuit Court.

J. Claybaugh and *B. K. Higinbotham*, for appellant.

T. H. Palmer, for appellee.

ELLIOTT, J.—The complaint of the appellant is in three paragraphs. The first counts on a written contract, the second on an oral agreement, and the third is for the use and occupancy of the land. The fourth paragraph of the answer sets forth the same written contract as that counted on in the complaint, and as the controlling question in the case is the construction to be given this instrument, it is necessary to set it out, although it is of considerable length. It is as follows:

"Be it witnessed by this memorandum of agreement, made this 20th day of June, 1878, by and between Samuel Ayers, Enos Harshman and Amos Heavilon, that for and in consideration of the sum of $1,500, cash in hand, to be paid to Samuel Ayers by said Amos Heavilon, said Samuel Ayers does hereby sell, assign and set over to said Amos Heavilon, all his right, title and interest in and to eight

promissory notes executed July 6, 1872, seven notes of $500 each, and one of $600, executed by Enos Harshman to Rebecca Bailey, secured by mortgage on the east half of the southwest quarter of section twenty-two, and the east half of the northwest quarter of section twenty-seven, all in township twenty-one north, of range two west, in Clinton county, Indiana; that suit has been brought on said notes and to foreclose said mortgage against said Harshman and one Leonidas Mitchell; that said cause is now pending in the Supreme Court; that said Heavilon agrees to pay to said Ayers the further sum of $500, whenever said case is decided in favor of said Ayers, and a foreclosure of said mortgage is obtained in said cause, in favor of said Ayers, or to his assignee; that in case said Leonidas Mitchell should, by the decision of said cause in the Supreme Court, obtain judgment in his favor, vesting in him the one-half interest in the said notes and mortgage, then said Heavilon is not to pay said Ayers any further sum than the $1,500, but is to pay said Harshman $500, to be paid on the Mitchell claim. Said Harshman and wife are to execute a deed of conveyance for said land to Amos Heavilon. It is further agreed, on the part of said Enos Harshman, that said Amos Heavilon shall obtain the judgment and foreclosure in the case of *Amos Heavilon* v. *Enos Harshman and wife*, now pending in the Clinton Circuit Court, and that judgment shall be taken immediately; that said sum of $1,500 so paid by said Heavilon to Samuel Ayers shall operate as a payment of that amount on the purchase of the Harshman lands by said Heavilon; that in case the said Mitchell shall gain said case in the Supreme Court, then shall said Heavilon pay the said $500, money that he obtains from the $2,000 to be paid Ayers, and $500 additional that he agrees to pay to satisfy said Mitchell's claim in case that he is successful in the Supreme Court, and Harshman is to pay the remainder, so as to satisfy the said Mitchell's claim; and in case said Mitchell shall be defeated in the Supreme Court, then shall the said Heavilon pay said Ayers

the additional $500, so as to make the $2,000 to be paid said Ayers for his interest in said mortgage, and shall be released from the payment of the additional $500 to satisfy Mitchell's claim; that said Amos Heavilon is to receive from said Harshman and wife the title to 653½ acres of land, situate in Perry township, Clinton county, Indiana; said title is to be obtained by foreclosure of said Heavilon's mortgage on said lands, and sale of said lands under said foreclosure, and by such necessary conveyances as such Harshman and wife can make so as to vest said title in the said Heavilon; said Heavilon hereby agrees to pay said Harshman for said land $35 per acre for all lying north of the Clark's Hill road, and $30 per acre for all lying south of said road; that said Heavilon shall apply so much of said purchase-money to the satisfaction of his mortgage claim and interest as shall be necessary to pay the same, and shall retain the purchase-money or so much thereof as may be necessary to satisfy the Mitchell claim, as above set out, after paying said Ayers $1,500; that said Heavilon is to pay said Ayers $400 to redeem forty acres of said land sold to said Ayers; that said Heavilon shall retain and appropriate so much of said purchase-money as shall be necessary to satisfy all taxes and a school fund mortgage, and shall retain all of said purchase-money until said title is vested in said Heavilon by the foreclosure and sale, and the proper conveyances are executed and delivered and title perfected in said Heavilon and all liens extinguished. Said Heavilon is to execute a deed of conveyance to said Nancy J. Harshman for eighty acres of timber land in Perry township, Clinton county, Indiana, for the sum of $2,400, which is part of said purchase-money for said Harshman land. Said Harshman is to pay interest on all money due Heavilon at this date until the 1st day of August, 1878, at ten per cent. Said Heavilon is to have possession of about ninety acres of said land for wheat ground, on or before the first day of August next, and the remainder of said land said Heavilon is to have possession of, giving

said Harshman time to remove his growing crops, said Harshman to take reasonable care of buildings and fencings. Said Harshman to have the dwelling-house and barn until the 1st day of March, 1879, if he desires it."

The paragraph of the complaint which counts on this contract avers that the appellant in all things complied with his part; that the appellee, Heavilon, procured the land to be sold on his decree of foreclosure and purchased it; that appellant delivered possession of the land to the appellee. It is further averred that the appellee failed to comply with the terms of the contract, in that he refused to pay the purchase-money for the land as he had agreed, and refused to convey to Nancy J. Harshman the forty acres of land as stipulated, and has failed to pay any of the obligations named in the contract. Judgment is prayed for the purchase-money. The fourth paragraph of the answer, after setting forth the contract, alleges that the appellee purchased and occupied the land under the contract; that at the time of the purchase there were divers judgment and mortgage liens on the land which greatly exceeded the sum the appellee had agreed to pay for the land; that among the liens was one in favor of the Farmers' Bank for $2,200 which the appellant agreed to pay; that he did not pay it, nor any of the liens which he had agreed to pay; that immediately after making the contract appellee, with intention to fulfil it, procured a decree of foreclosure and sale of the land and became the purchaser for $11,816; that he paid Samuel Ayers $1,900 in cash; that on the last day of the year allowed for redemption, the Farmers' Bank redeemed from his sale, and afterwards enforced the right acquired by such redemption by a sale of the lands, and that such sale divested all title of the appellant and appellee to the land.

The rule that the consideration of a contract may be shown by parol evidence is an elementary one, and applies in such a case as this. If it be true, as alleged, that the appellant agreed to pay the lien which finally swept away the property

purchased of him by the appellee, then it seems clear that this agreement constituted part of the consideration of the contract, and that if the appellant lost title by his failure to yield the agreed consideration he is in no situation to enforce payment of the purchase-money. One who agrees to convey land by general deed of warranty is bound to make a good title, and if, through his own fault, he is unable to convey such a title, he can not recover the purchase-money.

A familiar rule in the construction of contracts is that the express mention of one thing implies the exclusion of all others, and applying this rule to the contract before us, it must be held that the mention of the things the appellee was to do implies that he was to do no others. If he was to do only the things specified, then the duty of doing all other things essential to protect the title devolved upon the appellant who had undertaken to vest title in the appellee. This leads to the conclusion that it was the duty of the former to pay off the liens which defeated title, and, having failed to do so, he can not recover the purchase-money for land which he was unable to convey.

Harshman was entitled to the debt secured by his mortgage, and the discharge of that debt yielded him nothing that he was not already entitled to, and it can not, therefore, be justly said that he got anything of value from Heavilon for which, either in law or equity, he should account. He got no more than he had a full legal right to receive, and this imposed upon him no duty to pay off liens which he had not contracted to remove.

In the absence of an agreement providing differently, the duty of paying off existing liens on land devolves on the grantor who undertakes to convey title; and if he would escape this duty he must show a contract devolving it upon the grantee. In this case there is no such contract. The ruling on the fourth paragraph of the answer was right. Judgment affirmed.

Filed April 24, 1884.

No. 11,316.

CLAWSON, TOWNSHIP TRUSTEE, *v.* THE CHICAGO AND GREAT SOUTHERN RAILWAY COMPANY.

95 152
150 433

RAILROAD.—*Construction of.—Crossing Highway.—Change of Highway.—Appropriation.*—Under section 3915, R. S. 1881, a railway company may construct its railroad over or across a public highway, and, where an embankment or cutting occurs, may make a change in the line of such highway, if necessary or desirable, and may take such lands for the construction of such change of highway, as may be deemed requisite, by purchase or gift, or by appropriation.

PLEADING.—*Insufficient Complaint.—Bad Answer.—Demurrer.*—Where the complaint is insufficient, it is immaterial whether a paragraph of answer is or is not sufficient to withstand a demurrer, for a bad answer is good enough to a bad complaint. In such case, where the plaintiff appeals, intervening errors are harmless, and the judgment must be affirmed.

From the Warren Circuit Court.

T. F. Davidson and *W. B. Durborrow*, for appellant.

HOWK, C. J.—In this case the appellant, Clawson, the plaintiff below, alleged in his complaint that he was the trustee of Warren civil township, in Warren county, and the appellee was a corporation organized under the laws of this State, and was then engaged in constructing its line of railroad in and through Warren township; that the board of commissioners of Warren county, at its March term, upon the petition of Wesley Waldriss *et al.*, located and established, and ordered to be opened and kept in repair, a certain highway in Warren township, particularly described in appellant's complaint; that such highway was laid out and opened in compliance with law, and had been used since that time as a public highway, and, as such, was under the control of the appellant, as trustee of said township. The appellant further averred that the appellee was constructing its railway at and in Warren township, over and against the aforesaid public highway, and in constructing such railway great masses of dirt, boulders, stone and brush were being thrown upon such highway, ren-

dering the same impassable and of no use to the public; that the appellee was constructing, and, if not enjoined, would continue to construct its railway along and on top of the aforesaid public highway, and by grading and filling, and by laying dirt, stone and brush on top of such highway, were rendering the same impassable, so that the public could not use it without great personal danger, and danger to animals driven thereon.

And the appellant further averred, that, as the trustee of Warren township, he made a demand upon the appellee's superintendent, workmen and contractors, and at the appellee's office, but the appellee's employees, in a rude, insolent and angry manner, refused, and had since refused, to comply with the demand made upon them to cease obstructing said highway; that the appellee had no right in and on said highway, for the uses to which it was being put for constructing its railway; and that the appellee had never, in any way, acquired the right to enter upon or use said highway, for the purposes of its railroad, or otherwise. Wherefore the appellant prayed for a perpetual injunction, etc.

The cause was put at issue and tried by the court, and a finding was made for the appellee; and, over the appellant's motion for a new trial, the court rendered judgment against him for the appellee's costs.

In this court, the appellant's learned counsel first complain, in argument, of an alleged error of the court in overruling his demurrer to the second paragraph of appellee's answer. In this paragraph of its answer, the appellee alleged that, in the construction of its line of railway over, across and along said highway, and in making such cuttings and embankments for its railway, it became most expedient for the appellee, in order to make said highway more easy of ascent and descent, and safe for travel, to take additional lands bordering along said highway whereon to construct said highway; all of which the appellee had done, and had constructed the highway on such new line and the same had

been securely fenced, so as to make the said highway safe and easy of travel; and that the appellee would turn said highway over in due form at once; wherefore, etc.

The appellee's counsel has not favored us with any brief or argument, in support of the decision of the court in overruling appellant's demurrer to the second paragraph of answer. We learn, however, from the brief of appellant's counsel, that the answer was framed, and the court held it to be sufficient, under the provisions of section 3915, R. S. 1881, in force since May 6th, 1853. This section of the statute provides as follows: "Whenever the track of such railroad shall cross a road or highway, such road or highway may be carried under or over the track, as may be most expedient; and in cases where an embankment or cutting shall make a change in the line of such road or highway desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such road or highway, or such new line, as may be deemed requisite by said directors. Unless the lands so taken shall be purchased or voluntarily given for the purposes aforesaid, compensation therefor shall be ascertained, in the manner in this act provided, as nearly as may be, and duly made by such corporation to the owners and persons interested in such lands; and the same, when so taken and compensation made, shall become part of such intersecting road or highway, in such manner and by such terms as the adjacent parts of such highway may be held for highway purposes."

Under these statutory provisions, we are of opinion that the facts stated in the appellant's complaint were wholly insufficient to constitute a cause of action in his favor against the appellee, or to entitle him to the interposition of the strong right arm of the law in his behalf. It is not a material question, therefore, in this case, whether the second paragraph of appellee's answer was or was not sufficient to withstand the appellant's demurrer thereto; for it is well settled

that even a bad answer is a good enough answer to a bad complaint. *Ætna Ins. Co.* v. *Baker*, 71 Ind. 102; *Tyler* v. *State, ex rel.*, 83 Ind. 563; *State, ex rel.*, v. *Porter*, 89 Ind. 260.

Under the statute, fairly construed, the appellee had the legal right in constructing its line of railway, if deemed requisite or necessary by its directors, to do just what the appellant charged that it did in his complaint, with reference to the public highway. But, in so doing, it became the duty of the appellee, under the statute, to take such additional lands as were necessary for the construction of such highway, and thereon to construct it. In the second paragraph of its answer, the appellee claimed that it had discharged this duty; but if it has not, we think it can be compelled to do so by mandate. *Indianapolis, etc., R. R. Co.* v. *State, ex rel.*, 37 Ind. 489; *State, ex rel.*, v. *Demaree*, 80 Ind. 519.

The appellant's counsel also complain, in argument, of the alleged error of the court in overruling his motion for a new trial. It is insisted that the trial court erred in excluding evidence offered by appellant to establish the facts alleged in his complaint. But, as we have reached the conclusion that the facts stated in the complaint were not sufficient to constitute a cause of action, it is manifest that the error of the court, if any, in excluding evidence offered to establish such facts, was at most a harmless error. Where the plaintiff appeals, as in this case, and the record shows he has no cause of action against the defendant, intervening errors, if any, must be regarded as harmless and the judgment must be affirmed. *Fell* v. *Muller*, 78 Ind. 507.

The judgment is affirmed, with costs.

Filed April 19, 1884.

No. 11,164.

CITY OF LOGANSPORT ET AL. *v.* CARROLL.

TAXES.—*Complaint to Enjoin Sale of Land for.*—A complaint to enjoin the sale of lands for taxes, which shows that the taxes have been paid, and also that the former owner against whom the taxes were assessed had abundant personal property subject to distress and sale for the taxes, shows two good reasons for the injunction.

SUPREME COURT.—*Harmless Error.*—*Evidence.*—The admission of improper evidence, which it affirmatively appears did not affect the verdict, is a harmless error and not available in the Supreme Court.

From the Cass Circuit Court.

J. C. Nelson and *Q. A. Myers*, for appellants.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellee.

COLERICK, C.—This action was brought by the appellee to enjoin the treasurer of the city of Logansport from selling certain real estate for taxes that had been assessed thereon by the city. A demurrer to the complaint, alleging insufficiency of facts, was overruled, and an answer of general denial was filed. The issues were tried by the court, and resulted in the rendition of a judgment in favor of the appellee, over motions for a new trial and in arrest of judgment. The errors assigned are the rulings of the court upon said demurrer and motions.

The material averments in the complaint were that the appellee was the owner of said real estate, which is described; that he purchased the same from Dyer B. McConnell, who purchased it from Hiram Z. Leonard; that at the time McConnell purchased it from Leonard certain taxes, amounting to about $195, were due from Leonard to the city; that at said time, and for a long period thereafter, Leonard was the owner of abundant personal property to satisfy said taxes, and the property so owned by him is described in the complaint. It was also averred that after the purchase of said real estate

by the appellee, the city had taken no steps to collect said taxes from Leonard, although he had, *and still has*, abundant personal property out of which the same can be, and might have been, collected, to wit, a lot of household goods, situate in a house on the east half of lot —. It was also averred that the taxes so assessed had been paid, that the appellants were attempting to collect said taxes from the real estate purchased by the appellee as aforesaid, and had advertised the same for sale, which sale, if made, would cast a cloud upon his title. Wherefore he prayed that the appellants be enjoined from selling the same, etc.

By these averments it appears that Leonard, before and at the time of the commencement of this action, had ample personal property out of which the taxes could have been, and can be, collected. It is the settled law of this State that the personal property of a person against whom taxes are assessed must be first levied upon and exhausted before his real estate, against his consent, can be sold to pay the taxes, provided the personal property is of such a nature and so situated that the treasurer, by the exercise of reasonable diligence, can levy upon it and make the amount of the taxes. See *Volger* v. *Sidener*, 86 Ind. 545, and the cases there cited. If the averments of the complaint in this case as to the nature, value and location of the personal property so owned by Leonard were indefinite and uncertain, as now asserted by the appellants, the court, on proper motion, would have required the complaint, in these respects, to have been made more specific and certain. *Volger* v. *Sidener*, *supra*. No such motion was made. The defects now complained of were cured by the finding of the court. *Pittsburgh, etc., R. W. Co.* v. *Hunt*, 71 Ind. 229.

The averment that the taxes had been paid before the commencement of the action rendered the complaint unquestionably good. The demurrer was properly overruled.

The only causes assigned for a new trial, that have been

discussed by the appellants, are, that the finding of the court was not sustained by sufficient evidence, and that the court erred on the trial in admitting certain evidence that was offered by the appellee, which is recited in the motion for a new trial. We have carefully examined the evidence, and find that it strongly tends to sustain the finding of the court, especially the averment in the complaint that the taxes had been paid before the action was brought. We can not disturb the finding on the weight of the evidence.

The evidence that was introduced over the objection of the appellants, above referred to, and of which complaint is made, related to the appointment of George W. Flanigan as deputy treasurer of the city of Logansport, and the confirmation of his appointment by the common council. We think, in view of the evidence set forth in the record, that it was wholly immaterial whether Flanigan was, or was not, legally appointed such deputy treasurer. If the appellee's right of recovery in the action had depended upon the legality of the levy that was made by Flanigan as such deputy, and of which he testified, it would probably have become proper, if not necessary, for us to decide the question presented as to the competency of the evidence introduced in relation to his appointment. But there is no conflict in the evidence as to the fact that the levy which was made by him was afterwards released. Evidently the finding in favor of the appellee was not based upon the fact that a levy had been made by Flanigan, but was founded upon the fact that the taxes had been paid. The admission of irrelevant and incompetent evidence, when it clearly appears that the verdict or finding was not based upon it, or influenced by it, is a harmless error. *Pettis* v. *Johnson*, 56 Ind. 139; *Roberts* v. *Huddleston*, 93 Ind. 173. The appellants were not prejudiced or injured by the evidence, and, therefore, can not complain. See *Scotten* v. *State, ex rel.*, 51 Ind. 52.

No error was committed in overruling the motion for a new trial. The other error assigned has not been discussed

by the appellants, and hence will not be considered by us. There is no error in the record.

PER CURIAM.—The judgment is affirmed, at the costs of the appellants.

Filed April 25, 1884.

No. 10,999.

SHULTIES, ADMINISTRATOR, *v.* KEISER.

SUPREME COURT.—*Filing Brief.*—*Dismissal.*—Where an appellant fails to file a brief within sixty days after the submission of the cause, the appeal will be dismissed.

SAME.—*Co-Parties.*—*Jurisdiction.*—Where the appellant's co-party does not appeal and is not named as an appellant, nor notified of the appeal, the same must be dismissed, as the court has no jurisdiction of the cause.

From the Whitley Circuit Court.

T. R. Marshall and *W. F. McNagny*, for appellant.

J. W. Adair, for appellee.

BEST, C.—On the 29th day of May, 1883, the appellee filed in the Whitley Circuit Court his application for the removal of the appellant as administrator of the estate of Andrew Keiser, deceased. In this application it was averred that said decedent died at said county on the 25th day of said month, intestate, leaving a widow, the appellee, and some other children surviving him; and that on the 26th day of said month the appellant induced the clerk of said county to appoint him administrator of said estate, by falsely representing to him that the widow and children had waived their right to such appointment, and had requested him to take it, etc.

On the same day the appellee, upon notice to appellant, applied to the judge of said court, during its vacation and at chambers, for an injunction to restrain the appellant from assuming the duties of his trust, and upon the hearing of such motion the judge made an order removing the appellant as administrator of said estate, and directing the clerk to appoint the appellee. From this order this appeal has been taken.

This proceeding is as novel as it was summary, and if an appeal will lie from such proceeding, which may well be doubted, this appeal must be dismissed, under rule 14 of this court, as the appellant did not file a brief in this cause within sixty days after its submission, and the appellee has not filed a written request that the cause be passed upon by the court. *Stephens* v. *Stephens*, 51 Ind. 542; *Murray* v. *Williamson*, 79 Ind. 287; *Sagasser* v. *Wynn*, 88 Ind. 226.

The appeal must, therefore, be dismissed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the appeal be dismissed, at appellant's costs.

Filed Jan. 26, 1884.

ON MOTION TO REINSTATE.

BEST, C.—The appellant has made a motion to reinstate this case, on the ground that the cause had not been submitted as to James H. Harrison, one of the persons named as an appellee, and on the ground that the appellant's brief was not filed in time, because he had furnished it to opposing counsel, who had not returned it in time.

The record discloses the fact that the cause had not been submitted as to James H. Harrison, as claimed, but this fact, instead of furnishing any ground for reinstating the cause, rather furnishes an additional reason for dismissing the appeal. James H. Harrison was one of the defendants and does not appeal. The appellant alone appeals, and should have named Harrison as an appellant, and notified him to join in the appeal. This he has not done, and this omission justifies the action of the court in dismissing the appeal. Section 635, R. S. 1881; *Harlan* v. *Watson*, 39 Ind. 393.

Many cases have been dismissed because the appellant failed to notify co-parties to the judgment of such appeal, and, certainly, such omission can not be cause for dismissing the appeal and at the same time be cause for reinstating the case. Without notice to such parties this court has no jurisdiction,

and the appeal should be dismissed. *Hunderlock* v. *Dundee, etc., Co.*, 88 Ind. 139.

As the omission to name Harrison as an appellant, and to serve notice upon him, would require the dismissal of the appeal were the cause reinstated, we will not consider the sufficiency of the excuse for failing to file a brief, as the cause must stand dismissed, whether the excuse is or is not sufficient. The motion should, therefore, be overruled.

PER CURIAM.—The motion is overruled.

Filed April 25, 1884.

No. 11,522.

HAKE *v.* BRAMES.

LIBEL.—*Letter.*—A letter written to C. by H., concerning B., was as follows: "I was unfortunate enough to have him in my employ at one time as a book-keeper. He is a liar. I would not believe him under oath."

Held, on demurrer to a complaint for libel, that each of the three sentences is libellous.

SAME.—*Justification as to only One of Several Sets of Words.*— An answer in such action, seeking to justify by alleging that the plaintiff had lied on one occasion, even if a defence to the second set of words, is not as to the others, and, pleaded to a complaint setting out the three sets of words, is insufficient.

From the Superior Court of Allen County.

W. H. Coombs, R. C. Bell and *S. L. Morris*, for appellant.

H. Colerick, W. S. Oppenheim, J. Q. Stratton and *E. Stratton*, for appellee.

BICKNELL, C. C.—The appellee sued the appellant for a libel, which was as follows:

"FORT WAYNE, November 2d, 1882.

"MR. PETER CERTIA—*Sir:* I see by the morning papers that one Louis Brames is attacking you. I know this same Brames. I was unfortunate enough to have him in my em-

ploy at one time as a book-keeper. He is a liar. I would not believe him under oath. FRANK HAKE."

The defendant demurred to the complaint for want of facts sufficient. He also demurred to each of the three sets of words alleged to be libellous, for the same reason. These demurrers were overruled.

The defendant answered in four paragraphs, of which the fourth was the general denial. Demurrers were sustained to each of the first three paragraphs of answer, and the issues upon the complaint and general denial were tried by the court, who found for the plaintiff $150, and rendered judgment therefor. The defendant appealed. He assigns, as errors, the overruling of the demurrers to the complaint and to each of its sets of words, and the sustaining of the demurrers to each of the first three paragraphs of the answer. He concedes in his brief, that the demurrer to the complaint was properly overruled, but he claims that the words of the first and third set are not libellous; that in the first set "the appellant was simply bewailing his own misfortune and not making any charge against the appellee," and that the third set, at most, was a comment upon and a qualification of the main charge contained in the second set, which alone contained a substantial libel, to wit: "He is a liar."

The three sets of words were:

1. I was unfortunate enough to have him in my employ at one time as a book-keeper. 2. He is a liar. 3. I would not believe him under oath.

Each of these sets of words is libellous. Written or printed matter may be libellous without charging a crime.

"As to those libels which by holding a person up to scorn or ridicule, and, still more, to any stronger feeling of contempt or execration, impair him in the enjoyment of general society, and injure those imperfect rights of friendly intercourse and mutual benevolence, which man has with respect to man, it is chiefly in this branch of libels, that the action for words spoken, and for words written, substantially differ."

Folk. Starkie Slander, section 154; *Gabe* v. *McGinnis*, 68 Ind. 538; *Bain* v. *Myrick*, 88 Ind. 137. Each of the three sets of words contains an imputation injurious to the plaintiff. There was no error in overruling the demurrers thereto.

The three paragraphs of answer were pleaded to the entire complaint. Each of them therefore is insufficient, if it answers only a part of the complaint. *Stahl* v. *Hammontree*, 72 Ind. 103; *Hancock* v. *Fleming*, 85 Ind. 571; *Franklin L. Ins. Co.* v. *Dehority*, 89 Ind. 347.

The three paragraphs of the answer undertake to justify the libel, and the justification is that the plaintiff did lie in a certain publication made by him, and, lying as aforesaid, is a man whom the defendant would not believe under oath, and that defendant did have said Brames in his employment as book-keeper, and was unfortunate by reason thereof.

The counsel for the appellant contend that the only substantial matter contained in the libel is the charge, "He is a liar." It is not necessary to decide whether such a charge is justified by averring a single act of lying, because if that were conceded, the defences would not amount to a justification of the other imputations. It does not follow that because a man has told a lie, therefore it is unfortunate to have him as a book-keeper, nor that he ought not to be believed on oath. The defences contain no answer at all to the imputation implied in the third set of words, which was that the plaintiff would swear to a lie. There is no error in sustaining the demurrer to the special defences, and there is no error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

ZOLLARS, J., took no part in the decision of this cause.

Filed April 25, 1884.

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153 512

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No. 10,969.

REEDER ET AL. *v.* NAY.

PROMISSORY NOTE.—*New Note for Extension of Time Not Payment.*—The execution of a promissory note payable in a bank, in lieu of matured promissory notes given for the purchase-money of real estate, for the purpose of obtaining an extension of time, does not operate as a payment.

SAME.—*Mortgage and Vendor's Lien.—Purchaser with Notice.*—Where such notes were secured by a duly recorded mortgage on the real estate, containing a stipulation for the payment of "the sum of money above secured," the mortgage may be foreclosed, and the vendor's lien enforced against the land in the hands of a purchaser from the mortgagor with notice of, and indemnified against, such unpaid purchase-money.

SAME.—*Release of Mortgage.—Want of Consideration.—Mistake.*—Where, in such action, the defendant alleges that prior to his purchase the mortgagee had released such mortgage of record, it is no reply to allege that such release was made without consideration or by mistake.

From the Henry Circuit Court.

F. W. Fitzhugh, D. W. Chambers, and *J. S. Hedges*, for appellants.

W. Grose, for appellee.

FRANKLIN, C.—Appellee, Nay, sued appellant Reeder on a promissory note and to foreclose a mortgage and have a vendor's lien declared against said Reeder and appellant Waterman Clift. Clift appeared and defended. A demurrer was overruled to the third paragraph of the complaint.

Appellant Clift answered in five paragraphs. A demurrer was sustained to the third paragraph of answer. A reply was filed in seven paragraphs. Demurrers were overruled to the second, third, sixth and seventh paragraphs of reply. There was a trial by the court, and a finding and judgment for the plaintiff. Clift appealed, making his co-defendant a joint appellant, and has assigned the following errors:

In overruling the demurrer to the third paragraph of complaint, sustaining demurrer to third paragraph of answer, and overruling the several demurrers to the second, third, sixth and seventh paragraphs of the reply.

The substance of the third paragraph of the complaint is as follows:

That on the 2d day of December, 1876, said Reeder and wife executed to one Elliott their mortgage on certain real estate (describing it) to secure the payment of three promissory notes of that date for $233.33, due respectively in nine, fifteen and twenty-one months, and were for the balance of the consideration-money for the real estate described in the mortgage; that the mortgage was duly recorded; that said Elliott, on the 10th day of January, 1877, sold and assigned by endorsement all his interest in said notes and mortgage to said plaintiff; that afterwards, on the 18th day of May, 1878, there was a balance due on said notes of $300. That said Reeder, not being then able to pay said balance due and desiring further time, executed to the plaintiff as evidence of said indebtedness, and to obtain said further time for the payment thereof, his certain other promissory note of said date, filed herewith and marked Exhibit A, for the said sum of $300; that said note was negotiable and payable at the Citizens' State Bank of New Castle, Indiana; that said Reeder had failed to pay the same, or any part of said indebtedness, and that upon the execution of said new note said plaintiff gave up and delivered to said Reeder said other three notes described in said mortgage; that on the 24th day of May, 1881, said Reeder sold and conveyed said real estate to said Clift; that the same was then and now is of the value of $2,000; that before and at the time the said real estate was so sold to said Clift, he well knew, and had full notice of said outstanding indebtedness for said purchase-money, and that said Reeder had then and there fully indemnified said Clift for the payment of the same; that said Clift still owns said real estate, and said Reeder is insolvent. Wherefore, etc.

The mortgage contained an express agreement "to pay the sum of money above secured." The giving of the new note was not a payment of the money, it was only changing the

evidence of the indebtedness which still remained, and done for the purpose of securing further time for its payment.

This paragraph of the complaint stated facts sufficient to constitute a cause of action, and there was no error in overruling the demurrer to it.

The third paragraph of defendant's answer, to which a demurrer was sustained, only contained the averments that the note sued on was payable at a bank, commercial paper, and governed by the law merchant.

The averments of the complaint are that the new note was executed to procure further time, and not as a payment of the debt. And this paragraph of answer does not answer that part of the complaint which charges said defendant with being indemnified against the payment of said debt. There was no error in sustaining the demurrer to this paragraph of the answer.

The next error complained of is the overruling of the demurrer to the second paragraph of the reply.

The first paragraph of the answer substantially alleged that before the purchase by Clift and the conveyance of said real estate to him, said appellee and said Elliott released said mortgage, and took said new note, making a copy of the release of record a part of said paragraph of answer. This paragraph of the reply avers, simply, that the release was without consideration. This is not sufficient. The plaintiff had the right to release the mortgage without any consideration if he desired to do so; but he could not do so and place such release on record, and then afterwards enforce the mortgage against a subsequent purchaser of the mortgaged property in good faith and for a valuable consideration. Such purchaser, without actual notice, would have the right to rely upon the record as it appeared, and would be protected by the record.

The third, sixth and seventh paragraphs of reply averred that the release was executed and placed of record by mistake, and was without consideration.

These paragraphs are no better than the second. If the

plaintiff, by his own mistake, released the mortgage, he must suffer the consequences of such act; he can not hold appellant responsible for his mistake. Appellant, without notice of such mistake, had the right to purchase the mortgaged property freed from the mortgage.

The court erred in overruling the demurrers to these paragraphs of the reply, for which errors the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs, and that the cause be remanded, with instructions to the court below to sustain the demurrers to the second, third, fifth and seventh paragraphs of the reply, and for further proceedings.

Filed April 25, 1884.

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No. 10,259.

LENNEN ET AL. *v.* CRAIG ET AL.

WILL.—*Construction of.—Devise to One and "Her Children After Her."—Life-Estate.*—A testator, after devising a portion of his estate to his children "as tenants in common," but that the share of one daughter should be less than the shares of the other children, provided that her share "shall descend to her and her children after her, free from and beyond any control of her husband, * * and unincumbered from any of the debts and liabilities of his, forever."

Held, that she took in fee-simple, and not a mere life-estate.

From the Hamilton Circuit Court.

M. L. Robinson, J. W. Lovett, T. J. Kane, T. P. Davis, A. F. Shirts, G. Shirts and *W. R. Fertig*, for appellants.

D. Moss, R. R. Stephenson and *J. Stafford*, for appellees.

HAMMOND, J.—Action by the appellees against the appellants for the partition of real estate. The controversy in the case grows out of the construction of the fifth clause of the will of Peter Lennen, who died in 1862, seized in fee simple of the real estate which is the subject of the present litigation.

In the second clause of his will, the testator gave certain real estate to his widow, to be held by her "during her widowhood, but not in fee simple." The third and fourth clauses relate to bequests of personal property. The fifth clause is as follows:

"*Fifthly.* I give and bequeath all the rest, residue and remainder of my estate, real and personal, to Ann Bratton, Thomas Lennen, Peter B. Lennen, Barbara Ann Keffer, Louisa Ellis and William C. Lennen, as tenants in common, to share alike, except that the share or portion belonging to my daughter Louisa Ellis, wife of James Ellis, be $150 less than the others, she having been paid and advanced that amount already; and it is further provided and excepted that the share or portion of said Louisa Ellis shall descend to her and her children after her free from and beyond any control of her husband, the said James Ellis, and unincumbered from any of the debts and liabilities of his forever. I also direct that at the death or marriage of my wife, Amelia, the real estate set apart for her support, in item No. 2, shall immediately descend and belong in fee simple, as tenants in common, to all my children as in this item No. 5 provided."

The devisees named in the fifth clause of the will were the testator's children. The appellees claim to own the undivided one-sixth of the land in controversy. Their claim is well founded, provided said Louisa Ellis took a life-estate only under the will and the remainder went to her children. Said Louisa Ellis and her husband, before her death, which occurred in 1876, made a conveyance of her interest in the real estate, and through that conveyance the appellants claim to own the interest contended for by the appellees. The question presented is whether the will gave Louisa a fee simple or a life-estate. The court below found the facts specially, and, on the theory that she took only a life-estate, gave its conclusions of law and rendered judgment in favor of the appellees.

If there were words in the will expressly giving the es-

tate to Louisa during her life and at her death to her children, there is no question but she would have taken but a life-estate and her children the remainder in fee, the word "children" being usually a word of purchase and not of limitation. 3 Jarman Wills, 106 n., 117 n., 174 and 182. But there are no words expressly limiting her interest to a life-estate. The real estate allotted to her was, in the language of the will, to "descend to her and her children after her." While the language is inexact, the meaning, we think, is that Louisa should take under the will from the testator, and her children, after her death, should hold by descent from her. We do not think it was intended that the children should take under the will, but should hold as heirs of their mother. Had the testator intended that Louisa should have but a life-estate, words commonly employed in such cases would no doubt have been used, as "to her during life, and at her death to her children." The manifest purpose of the testator was that his daughter should hold the land free of the debts of her husband, and that he should have no part in its inheritance at her death. He could not, of course, control the descent if she took the fee simple. An estate which at common law was adjudged a fee tail is under our statute to be held a fee simple. Section 2958, R. S. 1881. The latter part of the fifth clause of the will, which provides that at the death or marriage of the testator's widow, the real estate, set apart to her in the second clause, shall descend and belong to all his children *in fee simple*, as provided in said fifth clause, manifests clearly, we think, his intention. A fee simple estate is well understood in the language of every day life as well as in the literature of the law as being the highest estate one can hold in land. And as the children, after the widow's death or marriage, were to take in fee simple the interest set apart to her, so, it seems to have been the testator's intention that they were also to take the same estate in the land immediately devised to them. The care taken by the testator to qualify the interest devised to his wife in the

second clause of the will is in marked contrast with the looseness of expression in the fifth clause, if the supposition prevails that he intended to give his daughter a life-estate only. Taking the will as a whole, we conclude that the testator intended to give his daughter Louisa, as well as his other children, a fee simple estate, but placed some supposed restrictions on her interest, designed to protect her and her children from the improvidence of her husband.

We think that the court below erred in its construction of the will.

Judgment reversed, at appellee's costs, with instructions to the court below to restate its conclusions of law upon the theory that Louisa Ellis took a fee simple interest under the will, and to determine the rights of the parties accordingly.

Filed April 25, 1884.

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No. 10,895.

BRADWAY ET AL. *v.* WADDELL ET AL.

SUPREME COURT.—*Bill of Exceptions.—Record.—Evidence.*—The evidence, when embodied in a bill of exceptions duly signed and filed, forms part of the record, no matter by whom it was taken down at the trial.

SAME.—*Instructions.—Motion for New Trial.*—Neither an instruction to the jury nor instruments of evidence can be made part of the record by merely referring thereto in a motion for a new trial.

INSTRUCTIONS.—*Request for Written.—Statute Mandatory.*—The statute, requiring that "the court shall give general instructions to the jury * * *in writing*, if required by either party," is mandatory, and, in such case, the giving of an oral instruction is erroneous.

SAME.—*Oral Directions.*—Oral directions to the jury to reject evidence, or as to the form of their verdict, are not "instructions," but statements of rules of law governing the matters in issue or the amount of recovery are.

From the Henry Circuit Court.

W. Grose, for appellants.

J. M. Brown, J. Brown and *W. A. Brown*, for appellees.

ELLIOTT, J.—The evidence in this case, although taken by

a stenographer, forms part of the bill of exceptions. It is incorporated in the bill at the proper place, and appellees' counsel are, therefore, in error in supposing that it is not in the record. No matter by whom the evidence is taken down, it is in the record, if fully and accurately embodied in the bill of exceptions, duly signed by the judge and properly filed.

Neither instructions nor instruments of evidence can be brought into the record by merely making them part of the motion for a new trial. In the present case we must look to the bill of exceptions to see what requests to instruct were made, and what instructions, oral and written, were given by the court.

The bill of exceptions contains this statement: "The plaintiff and defendants also having at the proper time requested the court to instruct the jury in writing only, before the argument to the jury." It is further shown by the bill that the court, at the time of reading the written instructions to the jury, orally instructed them upon the subject of nominal damages and as to the form of their verdict, and that the appellants at the time excepted "because the same was oral and not in writing."

Our statute provides that "when the argument is concluded the court shall give general instructions to the jury, which shall be in writing and be numbered and signed by the judge, if required by either party." The statute is in terms mandatory, and from the earliest to the latest cases it has been so construed. It has been uniformly held that the trial court, when properly requested, is bound to put all of its instructions in writing. In *Townsend* v. *Doe*, 8 Blackf. 328, decided in 1846, it was held that the statute was mandatory, and such was the holding in the cases of *McClay* v. *State*, 1 Ind. 385; *Kenworthy* v. *Williams*, 5 Ind. 375; *Lung* v. *Deal*, 16 Ind. 349. In the case of the *Rising Sun, etc., Co.* v. *Conway*, 7 Ind. 187, a like ruling was made and the court said: "The evil to be remedied was the difficulty, severely felt by the bar, of getting a bill of exceptions which should fully em-

body the verbal charge. The act should therefore receive such a beneficial construction as should effect the object designed. * * * There is no great hardship in the strictness thus imposed. Its safe and beneficial operation is obvious. Were the rule once relaxed, it is easy to see that the object of the act would be defeated." The holding in *Laselle* v. *Wells*, 17 Ind. 33, was that all instructions must, when duly requested, be in writing, and that an error in giving verbal instructions is not cured by afterwards reducing the verbal instructions to writing; and to the same effect is the case of *Widner* v. *State*, 28 Ind. 394. It is worthy of note that in the case just cited it was held that giving a verbal instruction was error, notwithstanding the fact that it was favorable to the appellant. One of the most careful and accurate judges that ever occupied a place in this court, speaking for the court, said: "This rule of practice is plainly violated, if the court, having been properly requested to reduce its charges to writing, proceeds to instruct the jury orally. And as we construe the statute, it renders the action of the court, in giving the oral instructions, erroneous, without reference to what they may say to the jury; hence it can not be deemed important, in the decision of questions such as the one under consideration, that instructions so given should be set forth in the record." DAVISON, J., in *Riley* v. *Watson*, 18 Ind. 291. These utterances of able judges who knew the necessity for the law requiring all instructions to be in writing, who were cognizant of the evils growing out of a different practice, and who were acquainted with the purpose of the framers of the law, are not to be lightly regarded; on the contrary, every principle of law requires that they be treated with the highest respect.

It was well and strongly said, in a case from which we have already quoted, that "The words of the court, on such occasions, are too weighty and decisive in their influence on the jury to be omitted. A particular turn of expression, given perhaps at random, may be decisive of the rights of the parties. The proper construction of the statute therefore is, that the whole

charge should be in writing; and that it should be given literally as it is thus written. Such seems to have been the construction of the act from the first." *Rising Sun, etc., Co.* v. *Conway, supra.* It surely is no hardship to require the court to do exactly what the law commands and the parties request. A line or two more costs but little labor, and prevents confusion, wrong, and error. There is really no excuse for refusing to do what the law commands, and what secures certainty and prevents needless wrangling. But, after all, a sufficient reason for the uniform ruling of this court is, that the law commands that all instructions shall be in writing, and the more closely courts, as well as everybody else, are held to strict obedience to law the better. It is not the older cases only that recognize and enforce the rule requiring all instructions to be written out in full, for the later cases are not less emphatic. *Feriter* v. *State*, 33 Ind. 283; *Meredith* v. *Crawford*, 34 Ind. 399; *Gray* v. *Stivers*, 38 Ind. 197; *Hardin* v. *Helton*, 50 Ind. 319; *Bosworth* v. *Barker*, 65 Ind. 595; *Provines* v. *Heaston*, 67 Ind. 482; *Shafer* v. *Stinson*, 76 Ind. 374; *Davis* v. *Foster*, 68 Ind. 238. In the case of *Provines* v. *Heaston, supra*, it was held that it was error to orally substitute the word "fairly" for the word "strictly." It was held in *Bottorff* v. *Shelton*, 79 Ind. 98, and in *Smurr* v. *State*, 88 Ind. 504, that it was error to read from the statute or other book, and that all instructions must be written out in full and filed by the court. The ruling in these cases is well sustained, not only by our own cases but everywhere else under statutes like ours. In *Hopt* v. *People*, 104 U. S. 631, the trial court indicated a place for the insertion of an extract from a book, and this was held error, the court saying: "This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record, as the statute required." The like ruling was made in *People* v. *Sanford*, 43 Cal. 29. In speaking of the duty of the court to instruct in writing, where the statute so provides, a late writer says: "Now, after the trial is over, the judge may

discover that he has put his foot in it, so to speak; and yet his pride of individual opinion may be such as to prevent him from acknowledging his error, or from signing, in a bill of exceptions, a fair statement of what he did say. Moreover, the charge of the judge, particularly where the points in controversy are numerous, and where the mass of evidence is great, may be so long that the jury can not get the full effect of it merely by hearing it repeated once. * * * The wisest, the most learned, the most accurate, the most honest and the most painstaking administration of justice, is, at best, full of imperfections; but it is intolerable that life, liberty, fortune and reputation should hang on such a slender thread as an oral charge to a jury." Thomp. Charging Jury, 137. Another writer says: "A judge on the trial of a cause has no authority to affect or change the law as stated in written instructions, by any statement not in writing. It is error for the court to instruct the jury orally, or to orally explain or modify an instruction." Sackett Instructions to Juries, section 1.

A modification of an instruction is not a technical error, nor is the failure to fully incorporate into the instructions all that the court says to the jury a technical error. Some of the courts go so far as to hold that in criminal cases it is an error of such a substantial character as that it can not be waived. It was so held in *State* v. *Cooper*, 45 Mo. 64, and the court said: "The provisions of the law are express and positive. They were enacted for wise and beneficial purposes, and neither courts nor parties are to be allowed to treat the law as naught, and construe it into a dead-letter, and substitute a different arrangement in its stead. * * * The jury are liable to misapprehend the language of the court; a full, perfect, and satisfactory bill of exceptions is unattainable; and thus a man's rights are invaded and frittered away, through a violation of law which was made for his protection. Public policy and the uniform and explicit standard which should always prevail in the administration of criminal justice, demand that the statute should be literally construed and rigidly adhered to

and enforced." Without stopping to comment upon them, we refer to the following cases as supporting our view that the violation of the statute requiring all instructions to be written out in full is a substantial error. *People* v. *Beeler*, 6 Cal. 246; *People* v. *Ah Fong*, 12 Cal. 345; *Dorsett* v. *Crew*, 1 Col. 18; *Gile* v. *People*, 1 Col. 60; *Ray* v. *Wooters*, 19 Ill. 82; *Illinois, etc., R. R. Co.* v. *Hammer*, 85 Ill. 526; *Head* v. *Langworthy*, 15 Iowa, 235; *State* v. *Potter*, 15 Kan. 302; *Swartwout* v. *Michigan, etc., R. R. Co.*, 24 Mich. 389; *Horton* v. *Williams*, 21 Minn. 187; *State* v. *Jones*, 61 Mo. 232; *Dixon* v. *State*, 13 Fla. 636; *Parris* v. *State*, 2 C. Greene, 449; *City Bank* v. *Kent*, 57 Ga. 283.

A direction to the jury to reject evidence, as to the form of verdict, or the like, is not an instruction within the meaning of the statute. *Stanley* v. *Sutherland*, 54 Ind. 339; *McCallister* v. *Mount*, 73 Ind. 559; *Lawler* v. *McPheeters*, 73 Ind. 577; *Trentman* v. *Wiley*, 85 Ind. 33. But statements of rules of law governing the matters in issue or the amount of recovery are instructions, and all such rules or statements must, when the proper request is made, be given to the jury in writing. Judgment reversed.

Filed April 25, 1884.

No. 11,262.

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The State, ex rel. Wasson, Auditor, *v.* Jones et al.

Taxes.—*Sale and Deed.—Title of Grantee.—State's Liens or Incumbrances.—School-Fund Mortgage.*—The purchaser and grantee of real estate, under a tax sale and deed, takes his title to such real estate under the provisions of section 6479, R. S. 1881, subject to all the claims which the State may have thereon for taxes, or other liens or incumbrances, such as a mortgage executed thereon to the State, as a security for the payment of a loan of its school fund, prior to such tax sale and the execution of such tax deed. This is so, although the taxes, for which the real estate was sold, had been assessed and delinquent long before the execution of such school-fund mortgage.

From the Montgomery Circuit Court.

G. D. Hurley and *B. Crane*, for appellant.

M. Thompson, *W. B. Herod* and *W. H. Thompson*, for appellees.

HOWK, C. J.—This suit was brought by the State of Indiana, on the relation of the auditor of Montgomery county, to foreclose a certain mortgage executed by the appellee Jones on certain described real estate, in the city of Crawfordsville, to secure a loan from the sinking fund evidenced by his promissory note, and to collect the debt secured thereby. The appellee Jesse B. McCallister held a tax title to the mortgaged real estate, and, on that ground, was made a defendant to the action. The cause was put at issue and tried by the court, and at the request of the appellant, the court made a special finding of facts and stated its conclusions of law thereon. The appellant excepted to the fifth conclusion of law, and the court rendered judgment in accordance therewith.

A number of errors are assigned by the appellant in this court, but the questions for our decision are fairly presented, as well for the appellee as for the appellant, by the alleged error of the court in its fifth conclusion of law upon the facts specially found. Therefore, we shall consider the questions in the case, as presented by this latter error, merely premising that the only question in controversy in this court, and, also, in the trial court, is in regard to the relative priorities of the respective liens of the appellant and of the appellee Jesse B. McCallister, upon the mortgaged real estate.

The facts found by the court were substantially as follows:

"*First.* That on the 7th day of May, 1873, the defendant Thomas S. Jones made and executed the school-fund note and mortgage sued on in this action; and that such mortgage was duly recorded in the office of the recorder of Montgomery county, on the 7th day of May, 1873, in school-fund mortgage record No. 1, at page 329.

"*Second.* That the interest on said loan and mortgage was paid up to May 7th, 1874, and that the principal sum of said

mortgage, with the interest thereon from May 7th, 1874, at the rate of eight per cent. per annum up to this time, and two per cent. damages are now due and wholly unpaid, and the same amount to the sum of $228.15, which is collectible without relief from valuation or appraisement laws.

"*Third.* That on the 8th day of February, 1875, the defendant Jesse B. McCallister bid in and bought said lot No. 3, at a public sale held and had by William P. Herron, the then treasurer of Montgomery county, within the hours prescribed by law, at the court-house door, in the city of Crawfordsville, in said county, for the sum of $37.96, the said sum being the amount of taxes, penalty and costs due on said lot No. 3 for the years 1873 and 1874, and previous years; and that, on said 8th day of February, 1875, said McCallister paid said sum to said treasurer, and obtained from James H. Wasson, auditor of said county, a certificate of purchase of said lot at said tax sale.

"*Fourth.* That the taxes for which said lot was so sold, were the taxes, State and county, for the years 1869, 1870, 1871, 1872, 1873 and 1874; and that the taxes and penalty for the year 1874 amounted to the sum of $2.42 at the time of said sale.

"*Fifth.* That the board of commissioners did not make any tax levy for the years 1871, 1872 and 1873, or either of them, and its records do not show any levy for either of said years, but that the taxes for said years, together with the taxes for the years 1869 and 1870, were actually charged against said lot upon the proper tax duplicate, and were regularly returned delinquent for each of said years, and were finally carried forward upon the tax-duplicate for the year 1874, and that such delinquent taxes, together with the interest, penalties and charges thereon, for the years previous to 1874, amounted to the sum of $35.54 at the date of said tax sale.

"*Sixth.* That on the 12th day of September, 1881, said McCallister obtained a tax deed for said lot No. 3, executed to him by James H. Wasson, the then auditor of said county,

upon the said certificate of tax sale, executed to said McCallister by said James H. Wasson."

Upon the foregoing facts the court stated the following conclusions of law:

"1st. For the plaintiff, and its damages are assessed against the defendant Jones at the sum of $228.15.

"2d. The plaintiff is entitled to a decree foreclosing its mortgage upon said lot No. 3 against both said defendants.

"3d. And the court also finds for the cross complainant McCallister, upon his cross complaint, for the sum of $69.87.

"4th. That he is entitled to a lien upon said lot No. 3 for said sum of $69.87.

"5th. That of said sum of $69.87, the sum of $65.72 (being the said sum of $35.54, with interest at 10 per cent. from February 8th, 1875), is a prior and superior lien upon said lot to the lien of plaintiff's mortgage; and the remainder thereof, to wit, the sum of $4.84 (being the sum of $2.42, with the interest thereon at 10 per cent. from February 8th, 1875), is a junior lien to that of plaintiff's mortgage, and is subject thereto."

The record of this cause, and the appellant's assignment of errors thereon, present for our decision this single question: Did the appellee McCallister, in his purchase of the mortgaged lot at the sale thereof for delinquent taxes, or by his subsequent acceptance of a tax deed of such lot, acquire any title to, or interest in, or lien upon the lot, which can be said to be prior or superior, either in law or in equity, to the lien of the State thereon under and by force of its school-fund mortgage? We are of opinion, that this question must be answered in the negative.

It will be observed, that the mortgage to the State for the use of its school fund was executed upon the lot by the appellee Jones, and was duly recorded in the proper recorder's office, nearly two years prior to the sale of such lot for delinquent taxes to the appellee McCallister, and more than eight years before he obtained his tax deed thereof, in pur-

suance of such sale. At the time of his purchase of the lot for taxes, and at the time he obtained his tax deed thereof, the appellee McCallister knew, or had the means of knowing, and, therefore, was bound to know, that the State had another lien upon such lot, as security for the loan of its school fund, and that, under the statute, the sale and conveyance of the lot to him for taxes were expressly subject to the lien of the State thereon, as a security for the payment of its school fund loan. Thus, in section 222 of the tax law of December 21st, 1872, in force at the time of the tax sale of the lot, and in section 6479, R. S. 1881, in force at the time of the execution of the tax deed in pursuance of such sale, it was and is provided that the title or estate, acquired by the purchaser at such sale or the grantee in such deed, in or to the lot sold, shall be "subject, however, to all the claims which the State may have thereon for taxes, or other liens or incumbrances." 1 R. S. 1876, p. 122. In *Reid* v. *State, ex rel.*, 74 Ind. 252, it was substantially held by this court, and correctly so, that an auditor's tax deed, made in consummation of a sale of real estate for taxes, can not bar or preclude the sovereign State from asserting and maintaining any existing claim or right to, or lien upon, such real estate in favor of the State. And further, it was held that in no event could such a tax deed work or operate as an estoppel against the State; for to hold otherwise would be fraught with danger to the public interests, and would render the enforced collection of taxes on private property, in which the State may have an interest as mortgagee or otherwise, almost or quite impracticable.

We are of opinion, therefore, that upon the facts specially found, the trial court clearly erred in holding, as it did, in its *fifth* conclusion of law, that any part of McCallister's claim and lien, under his tax deed, was prior and superior in law or equity to the lien of the State upon Jones's lot, under and by reason of its school-fund mortgage. Whether or not, upon the facts specially found by the court, McCal-

lister had any valid, legal or equitable lien upon Jones's lot, under the tax sale and deed, is a question not presented here, and, therefore, it is neither considered nor decided.

The judgment is reversed with costs, and the cause is remanded with instructions to the court to set aside its *fifth* conclusion of law, and to state in lieu thereof that McCallister's claim and lien are subject and inferior, in law and equity, to the lien of the State, under its school-fund mortgage, and render judgment accordingly.

Filed April 23, 1884.

No. 10,861.

Peoria, Decatur and Evansville Railway Company *v.* Flicker, Administrator.

Supreme Court.—*Waiver of Error.*—Errors assigned and not discussed will be assumed not to exist.

Same.—*Judgment, Review of.—New Trial.—Evidence.—Record.*—In a bill to review for error apparent of record, on the ground that the court erred in overruling a motion for a new trial, no question is presented as to the sufficiency of the evidence or the amount of damages, unless the evidence was made a part of the record.

Same.—*Complaint.*—An averment in the complaint that a full transcript of the evidence is filed is not sufficient, as this may be done, and yet the evidence may not have been made a part of the record.

Instructions.—*Presumption.*—In the absence of the evidence, and of a statement that instructions refused were applicable to the evidence, those refused will be deemed to have been properly rejected for such reason, and those given properly given, unless erroneous under any supposable state of facts.

From the Vanderburgh Circuit Court.

C. Denby and *D. B. Kumler*, for appellant.

C. F. Gould and *C. L. Wedding*, for appellee.

Best, C.—The appellee brought an action against the appellant for killing the decedent, by negligently backing a car over her, as was alleged, and recovered a judgment for $1,-

000. This action was brought to review that judgment. The complaint consisted of two paragraphs. The first was for new matter discovered since the rendition of the judgment, and the second was for error of law apparent of record. A demurrer was sustained to the second paragraph, and this ruling presents the only question in the record.

The second paragraph averred, in substance, that the defendant had instituted an action against the plaintiff for negligently killing the decedent; that an issue was formed, a trial had, a verdict returned for $1,000, motion for a new trial made, overruled, exceptions taken, and judgment rendered upon the verdict for the defendant; that "the plaintiff files herewith, marked 'Exhibits A and B,' a full transcript of all the evidence given in said cause, and of all the records and proceedings therein;" that there is manifest error apparent upon the face of the record, in this, that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in overruling the demurrer to the amended complaint, and in overruling the motion for a new trial.

The first and second alleged errors are not urged, and we, therefore, conclude that they do not exist.

In support of the third, it is insisted that the evidence was not sufficient to support the verdict; that the damages assessed were excessive, and that the court erred in giving and in refusing to give instructions.

The appellee insists that the evidence is not in the record, and in its absence these alleged errors do not appear. An examination of the complaint, and the exhibits accompanying it, fails to show that the evidence was made a part of the record. Exhibit "B" simply purports to be the stenographer's report of the evidence; it does not purport to be, nor was it by bill of exceptions or otherwise, made a part of the record, and hence it can not be so considered. Aside from this there is nothing else, and, therefore, the evidence is not in the record. In its absence, of course no question arises as to its sufficiency or as to the amount of damages assessed, and

hence these alleged errors do not appear of record. *Reed* v. *Worland*, 64 Ind. 216; *Boyd* v. *Fitch*, 71 Ind. 306.

The complaint avers, it is true, that "a full transcript of the evidence given" is filed, but this does not obviate the objection, as this may be true, and yet the evidence may not have been made a part of the record. This must appear, as the questions must be tried by the record and not by the averment of the pleader. *McDade* v. *McDade*, 29 Ind. 340.

The remaining question is whether the court erred in giving or refusing to give instructions. In the absence of the evidence, the action of the court in this respect very rarely warrants this court in disturbing the judgment. If there is no statement, as there is not in this case, that the instructions were applicable to the evidence, those refused will be deemed to have been properly rejected because they were not applicable to the evidence, and those given will be deemed correct unless erroneous under any supposable state of facts. It is not insisted that those given were obnoxious to this rule, and as an examination of them leads us to believe that they were not, it becomes unnecessary to set them out or notice them more particularly.

As these alleged errors do not appear of record, for the reasons given, the demurrer was properly sustained, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the appellant's costs.

Filed April 25, 1884.

No. 11,335.

DURHAM *v.* BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY.

TAXES.—*Voluntary Payment.*—Without a statute authorizing it, no recovery can be had for taxes voluntarily paid, although paid under protest.

Durham v. Board of Commissioners of Montgomery County.

SAME.—*Refunding of.—Complaint.*—A complaint under section 5813, R. S. 1881, to recover taxes alleged to have been wrongfully assessed, must show, not only that the assessment was unauthorized and irregular, but also that the property was not justly subject to the assessment.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Humphries*, for appellant.

M. Thompson, *W. B. Herod* and *W. H. Thompson*, for appellee.

ELLIOTT, J.—This is an action to recover taxes alleged to have been assessed against the appellant by an unauthorized special assessment.

It has long been the rule in this State that there can be no recovery for taxes voluntarily paid, even though paid under protest, unless there is a statute authorizing such a recovery. *Jenks* v. *Lima Tp.*, 17 Ind. 326; *Martin* v. *Stanfield*, 17 Ind. 336; *Lima Tp.* v. *Jenks*, 20 Ind. 301; *City of Indianapolis* v. *Langsdale*, 29 Ind. 486; *Board, etc.*, v. *Ruckman*, 57 Ind. 96. If the appellant is entitled to maintain this action, it must be on the ground that there is a statute authorizing it. There is now in force a statute authorizing the refunding of taxes in certain cases. *City of Indianapolis* v. *McAvoy*, 86 Ind. 587. But although there is such a statute, still there is no cause of action stated in the complaint, because it is not shown that the claim of the appellant is within it. An elementary rule is that one who founds a right of action on a statute must make a case within its terms. This the appellant has not done. In order to make a case within the statute, it must be shown, not only that the special assessment was made by an unauthorized person, and in an irregular manner, but also that the property upon which the taxes were laid was not justly subject to the assessment. It is not enough to show that the special assessment was irregular and unauthorized, for it must also be shown that the taxes were unjustly levied. A man can not evade the payment of taxes justly chargeable against him by showing that the wrong person made the assessment. This subject is so well and thor-

oughly discussed in the opinion of NIBLACK, J., in *Board, etc.*, v. *Armstrong*, 91 Ind. 528, that further discussion is unnecessary. Judgment affirmed.

Filed April 19, 1884.

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No. 10,958.

BLACK ET AL. *v.* RICHARDS ET AL.

PARTITION.—*Will.*—*Copy.*—*Pleading.*—*Several Defences can not be Pleaded Jointly.*—In an action for the partition of real estate, the several defendants answered jointly, alleging title in one of them only under a certain will, made part of the answer by copy.

Held, on demurrer, that the will was not the foundation of the defence, but only evidence; and that, as the answer showed title in only one of the defendants, it was insufficient as a joint answer.

SAME.—*Joint Will by Owners in Common.*—Owners in common may dispose of their common property by a joint will, and, upon the death of both, leaving the will unrevoked, it can be admitted to probate.

SAME.—*Uncertainty of Description.*—*Evidence.*—A will, attempting to devise real estate, described it as follows: "The west half of the southwest fr., section (19) nineteen, township (22), range (1 W.), contain (72) seventy-two and (40) hundredths acres," but it did not name the state or county, nor whether the township was "north" or "south."

Held, that, under the modern rule, that the thing devised may be identified by parol evidence, the will is not void for mere uncertainty of description.

From the Clinton Circuit Court.

J. Claybaugh and *B. K. Higinbotham*, for appellants.

S. H. Doyle, P. W. Gard, R. P. Davidson and *T. H. Palmer*, for appellees.

NIBLACK, J.—The complaint in this case charged that Isaiah Black, Priscilla Pedlow and Amanda Crone are the owners of three undivided fifth parts of a tract of land in Clinton county, particularly describing it, and that Lydia Richards and Elihu Black are together the owners in equal proportions of the remaining two undivided fifth parts of the same land; that the plaintiff Thomas Pedlow is the husband of Priscilla Pedlow, and that Robert W. Crone, the remain-

ing plaintiff, is the husband of Amanda Crone; that William W. Richards, in his own right, and John J. Richards, as the administrator of the estates of Elizabeth Black and Ann J. Black, deceased, with the will annexed, claim some interest in the land adverse to the plaintiffs. Wherefore partition and all other proper relief were demanded.

Lydia Richards, William W. Richards and John J. Richards answered: *First.* In denial. *Second.* That the said Elizabeth Black and Ann J. Black were, during the last years of their joint lives, the owners in fee simple, and tenants in common, of the land described in the complaint; that on the 19th day of July, 1879, the said Elizabeth Black and Ann J. Black executed a will, by the terms of which the survivor was to have and to hold said land during her life, and after the death of both of them, such land should become the property of the defendant William W. Richards in fee simple; that the said Ann J. Black died in August, 1879, and the said Elizabeth Black died on the 6th day of September, 1882; that said will was duly admitted to probate on the 12th day of said last named month, a copy of which will was filed with the answer.

The plaintiffs demurred to this answer, but their demurrer was overruled, and, declining to plead further, final judgment was rendered against them upon demurrer.

The will does not, within the meaning of the code, constitute the foundation of the defence attempted to be set up by the answer. It is not an instrument purporting to have been executed by the plaintiffs, or any of them, or to be personally obligatory upon them, or any of them. *Noble* v. *McGinnis*, 55 Ind. 528; *Parsons* v. *Milford*, 67 Ind. 489. Construing everything most favorably to the defendants, the will affords the only evidence tending to establish title in William W. Richards to the land in dispute.

Written instruments, which are merely to be used as evidence, are not required to be filed with the pleadings in a cause, and do not become a part of any pleading by being

filed with it. R. S. 1881, section 362; *Cassaday* v. *American Ins. Co.*, 72 Ind. 95, and cases cited by it; *Sedgwick* v. *Tucker*, 90 Ind. 271.

As the filing of a copy with the answer in this case did not make the will a part of that pleading, it follows that the demurrer did not raise any question, either upon the validity or the construction of that instrument in the circuit court, and that this appeal brings no question to this court touching the manner of its execution or legal effect of the will. The will being thus, in legal effect, eliminated from the answer, there remains only an averment of title in William W. Richards as a defence to the action. This is as to him only an argumentative denial of the facts charged in the complaint, and is no defence for the remaining defendants, who join in the answer without asserting any interest in the land. It is an old and well recognized rule in pleading that a plea which is bad in part is bad *in toto*, and that hence, where two defendants join in a plea which is insufficient for one, it is bad as to both. 1 Chitty Plead. 567; *Poulk* v. *Slocum*, 3 Blackf. 421. This rule has been held to be applicable to answers under the code of 1852, and applies with equal force to that class of pleadings under the code of 1881. *Brownfield* v. *Weicht*, 9 Ind. 394; *Ward* v. *Bennett*, 20 Ind. 440. The demurrer to the answer ought to have been sustained.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Nov. 27, 1883.

On Petition for a Rehearing.

Niblack, J.—The alleged will, referred to in the foregoing opinion, is as follows:

"July 9th, 1879.

"In the name of the Benevolent Father of all, I, Elizabeth, and Ann Jane Black, do make and publish this our last will and testament. Item 1st. The west half of the southwest fr., section (19) nineteen, township (22), range (IW),

contain (72) seventy-two and (40) hundredths acres. It is our desire and wish and request, that on the death of either of us, that the remaining survivor is to have and to hold the above described land during her lifetime, undivided and unsold, for her own use and benefit. After the death of Elizabeth and Ann Jane Black, the above described lands are to be given, by our devise and wish, to William W. Richards. The said William W. Richards is to pay to his brother John J. Richards the sum of $800, and to our beloved sister, Lydia Richards, two hundred dollars ($200), one bed and bedding, and one cow. To our beloved sister, Amanda Crone, twenty-five dollars ($25), and a bed and bedding, and to our brother, Isaiah Black, the sum of five dollars ($5). Our sister Priscilla Pedlow is to have five dollars ($5).

"We devise and bequeath to the United Presbyterian Church the sum of $100, to be paid by William W. Richards. The above named William W. Richards is to have and to hold all the personal property not otherwise disposed of, and the said William W. Richards is to pay all funeral expenses."

This instrument purports to have been signed by the said Elizabeth Black and Ann Jane Black, and published as their will, in the presence of two subscribing witnesses, in the usual form, and to have been duly proven and admitted to probate on the 12th day of September, 1882, as averred in the answer ruled upon in the original opinion.

Counsel for the appellants, as well as the appellees, have united in a request that we shall pass upon the question of the validity of the instrument so purporting to be the last will and testament of the persons who executed the same, upon the theory that it had been properly made a part of the answer in the cause, and with the view of preventing further litigation, and especially of saving the necessity of another appeal to this court. We have consented to comply with the request thus made.

It is objected: *First.* That there can not be a conjoint or

mutual will; that such a will is unknown to the testamentary law of this country. *Secondly.* That the instrument before us is void because of uncertainty in the description of the real estate it assumes to dispose of in the manner and form therein prescribed.

It seems to have been once recognized as a rule in the testamentary disposition of property, that neither a joint nor a mutual will could be made effectual for such a purpose; but more recently that rule has been very much modified, and can no longer be held to be one of general application.

On that subject Williams on Executors, at page 11, says: "But there are several authorities which appear to show that this doctrine does not go farther than to deny that a conjoint or mutual will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a will is certainly revocable. But if either of the testators dies without revoking it, the will is valid and entitled to probate as far as respects his property. Where, however, two testators made a joint will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the will during the lifetime of either."

In Jarman on Wills it is said, that "Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon the death of each, as if he had made a separate will. But a joint will, made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either." 1 Jarm. Wills, 31.

These extracts comprise a mere summary of what has been decided in certain leading cases touching the subject of conjoint or mutual wills, and are in accord with the evident weight of modern authority. Applying the doctrine of these extracts to the will under consideration, the objection to it founded upon its conjoint or mutual character can not be sustained. Whether it might have been admitted to probate

after the death of Ann Jane Black as her separate will, and whether it might have been after that event revoked in any manner or to any extent by the survivor, Elizabeth Black, are questions not now involved. *Schumaker* v. *Schmidt*, 44 Ala. 454; *Lewis* v. *Scofield*, 26 Conn. 452; *Wyche* v. *Clapp*, 43 Texas 543.

Not having been admitted to probate until after the death of both of the testatrixes, when it was to take full effect, it was properly admitted as the will of both.

It is claimed that the description of the real estate, assumed to be devised by the will, is incurably, and hence fatally, defective, because no State or county is named, and because it is not stated whether township twenty-two, referred to in the attempted description, is north or south of some base line from which congressional townships are numbered.

A will, as regards the devisee or legatee, is sufficiently certain if the testator has provided means for ascertaining the intended object of his bounty, and in the ascertainment of that object merely extrinsic evidence may in very many instances be resorted to. In that connection, the situation and circumstances of all the parties, and particularly of the testator and his family, sometimes become material. Williams Executors, 1153 and notes.

It is further said in Williams on Executors, on page 1202, that "The rules, which there already has been occasion to state, as to the admissibility of evidence of extrinsic facts, and of extrinsic evidence of intention, in order to enable the court to identify the *person* intended by the testator to be the object of his bounty, are equally applicable, *mutatis mutandis*, as to the admissibility of such evidence for the purpose of making certain the *thing* intended to be bequeathed by him."

In describing the subject-matter of the devise or bequest, parol evidence is admissible to correct a misdescription in some merely subordinate respect. Williams Executors, 1141, 1152, 1153, and notes; *Allen* v. *Lyons*, 2 Wash. C. C. 475.

In matters of description, the rule that everything is con-

sidered certain which may be made certain, is applicable to wills. 2 Redf. Wills, 399, and note; 1 Jarm. 668. Jarman on Wills states the rule to be: "That extrinsic evidence is not admissible to alter, detract from, or add to, the terms of a will, though it may be used to rebut a resulting trust attaching to a legal title created by it, or to remove a latent ambiguity arising from words equally descriptive of two or more subjects or objects of gift." 3 Jarm. Wills, 705. See, also, 1 Redf. Wills, 426, 588.

O'Hara, in his work on the Interpretation of Wills, on page 374, concludes his review of void testamentary gifts, as follows: "The question whether an uncertainty of the description of the subject or objectof a gift by will can be cured or not by parol resolves itself into the *ulterior* inquiry, is the ambiguity so patent as that the testator shows he was aware of it, and that he was leaving a part of his will undeclared in writing? As this is very rarely the case, it follows that at the present day hardly any case of uncertain or erroneous description in a will can occur which may not be remedied by parol."

This conclusion by O'Hara has been criticised as implying a too liberal rule in the admission of parol evidence in the interpretation of wills; but, however that may be, it is seemingly sustained by some decided cases.

From the earliest period in the history of testamentary law, there has been manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments. Regret has sometimes been expressed at the disposition thus manifested, but the courts have nevertheless continued to countenance that line of judicial policy. It must, therefore, be accepted and acted upon as an established rule of construction at the present time. *Riggs* v. *Myers*, 20 Mo. 239; *Wilkins* v. *Allen*, 18 How. 385; *Cleveland* v. *Spilman*, 25 Ind. 95; *Brownfield* v. *Brownfield*, 12 Pa. St. 136; *Moreland* v. *Brady*, 8 Oregon, 303.

The description complained of in this case describes a

tract of land, but designates it so imperfectly that we can not say, as a matter of judicial knowledge, that it lies within this State. Every congressional township contains a section "nineteen," and there are many such townships in the north-western States and territories, which are known as number "twenty-two." Considered, therefore, with reference to these extraneous circumstances, the description is ambiguous and imperfect, and hence uncertain in its particular application to the tract of land described in the complaint, or to any other tract lying within this State. This uncertainty is consequently of that species which may be cured by extrinsic evidence, and hence of a character which does not impair the validity of the will.

Whether the ambiguity and imperfection in this description can be best cured, if at all, by suitable averments in an amended answer to the petition for partition, or through the medium of a cross complaint is a question to which our attention has not been directed. But for the reasons given at the former hearing, the second paragraph of the answer, then under consideration, was bad upon demurrer, and on that account the petition for a rehearing is overruled.

Filed April 26, 1884.

No. 9628.

Pence et al. *v.* Armstrong et al.

Mortgage.—*Description of Real Estate.*—A description of real estate in a mortgage, that may be rendered certain by averment, is not void for uncertainty.

Same.—In describing a parcel of land as being north of the "ground of the C. C. C. & I. R. R." the use of the word "ground," instead of the "right of way," does not render such description void.

Same.—*Replevin Bail.*—*Subrogation.*—A replevin bail upon a judgment recovered upon a note secured by a mortgage, when compelled to pay the judgment, is entitled to be subrogated to all of the rights of the mortgagee under the mortgage.

Same.—*Foreclosure.*—Such bail is not compelled to exhaust the property of the judgment debtor by execution before he can foreclose such mortgage.

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125	242
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139	574
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139	652
95	191
140	23
141	413
95	191
150	268
150	475
151	19
152	428
95	191
158	677

SAME.—*Mistake in Description.—Reformation as Against Subsequent Bona Fide Purchaser.*—A mortgage which fails to describe the land intended to be mortgaged can not be reformed and foreclosed against a subsequent *bona fide* purchaser, but may be against a subsequent purchaser with notice of the mistake.

SAME.—*Notice.*—A mortgage which contains a defective description may be reformed and foreclosed against a subsequent purchaser for value, without actual notice, as the description may be rendered certain by averments, and such descriptions are not void, but are sufficient to put all purchasers upon inquiry and thus to charge them with notice.

SAME.—The fact that the mortgagor, at the rendition of the judgment, owned a large amount of other real estate upon which it became a lien, does not preclude such bail from foreclosing the mortgage, nor does the fact that a third party, to whom a portion of such land was conveyed, agreed to pay the judgment prevent the foreclosure of such mortgage, as these remedies are merely cumulative, and neither is dependent upon the enforcement of the other.

REDEMPTION.—Where the holder of a certificate of purchase receives the redemption money, the redemption is complete whether the person paying the money was legally entitled to redeem or not.

SAME.—*Purchaser of Certificate of Sale After Redemption.*—A purchaser of a certificate of sale after redemption can acquire no title through such certificate, though he had no notice of such redemption at the time of such purchase.

SAME.—*Purchase for Benefit of Owner.*—Where the owner of the equity of redemption places means in the hands of another with which to redeem such property, and such other person thereafter purchases such certificate and transfers it to another, such purchase operates as a redemption of such property, and the last purchaser can not claim title through such certificate, though he had no notice of such redemption at the time his purchase was made.

SUBROGATION.—*Assignee of Judgment on Note Secured by Mortgage.—Replevin Bail.*—The assignee of a judgment, recovered upon a note secured by a mortgage, acquires by his purchase the mortgage, and bail upon the judgment upon payment is subrogated to all the rights of the assignee under said mortgage.

SAME.—Where A. holds two mortgages upon the same land, and the note secured by the senior mortgage is put into judgment, the judgment transferred, replevin bail entered and the judgment afterwards paid by the bail, such bail is entitled to be subrogated to all the rights of the assignee of such judgment against all persons claiming through the mortgagee under the junior mortgage.

From the Henry Circuit Court.

M. E. Forkner, *J. W. Sansberry*, *M. A. Chipman* and *W. R. Pierse*, for appellants.

J. H. Mellett, *E. H. Bundy*, *C. L. Henry* and *H. C. Ryan*, for appellees.

BEST, C.—This action was brought by Nathan Armstrong against Samuel Pence, James VanWinkle, Elijah J. Walden and others, to reform and foreclose a mortgage.

The action was commenced in the Madison Circuit Court and the venue changed to the Henry Circuit Court. After the venue was changed an amended complaint was filed.

The amended complaint averred, in substance, that Alfred Walker, on the 23d day of March, 1874, executed to James M. Dickson a mortgage upon the following real estate in Madison county, Indiana, viz.: Commencing at a point on the east side of Main street, in the city of Anderson, 208 feet south of the southwest corner of lot number seven (7), in Williams's second addition to said city, running thence south with the east line of Main street, in said city, to the Cleveland, Columbus, Cincinnati and Indianapolis railroad; thence east by south with said railroad to the first alley; thence north to a point directly east of the starting point, and thence west to the place of beginning, to secure a note of $1,280, executed at the same time, payable on the 6th day of February, 1876, with interest and with attorney fees, which mortgage was duly recorded in the recorder's office of said county on said day; that said real estate was thus described in said mortgage: "Commencing at the southwest corner of a lot formerly owned by B. F. Jackson, in the southeast square of the city of Anderson, running thence south with the east line of Main street, in said city, to the ground of the Cleveland, Columbus, Cincinnati and Indianapolis railroad; thence east with said ground to the first alley; thence west to a point directly east of the starting point; thence west to the place of beginning;" that the word "west" was written in the description instead

of "north" by mistake, and that the southwest corner of the Jackson lot is 208 feet south of lot number seven (7), in Williams's second addition to said city; that on the 4th day of November, 1875, said James M. Dickson endorsed said note to the Madison County Bank, and said bank assigned the same to the Indianapolis National Bank; that on the 23d day of March, 1876, the last named bank recovered a judgment upon such note, in the circuit court of the United States for the District of Indiana, for $1,518, and on the 27th day of April, 1876, the plaintiff became replevin bail upon said judgment; that afterwards he was compelled to and did pay $1,860.34, in full of said judgment, which sum, with the interest thereon, is due him and remains unpaid; that Alfred Walker, on the 26th day of February, 1875, conveyed said real estate to Elijah J. Walden, who still owns the same, and that Samuel Pence, James VanWinkle, and the other persons named, each claim some lien upon or title to said land, but that the lien or title of each is subject to said mortgage; that each of said persons had full and actual knowledge of said mortgage, and that the same was unpaid at the time such liens or titles were acquired. Wherefore he asks to be subrogated to the rights of the mortgagee and his assignees under said mortgage, and that the same be reformed and foreclosed.

Separate demurrers were filed to the complaint by Samuel Pence, James VanWinkle and Elijah J. Walden, on the ground that it did not state facts, etc. These demurrers were overruled. Separate answers were filed. The answer of VanWinkle contained four, and the answer of Pence contained five paragraphs. They also filed a joint answer of seven paragraphs. A demurrer was sustained to the fifth and sixth paragraphs of the joint answer, and a reply in several paragraphs was filed to each answer. A separate demurrer by Pence to the second and fifth paragraphs of the reply, and a joint demurrer by Pence and VanWinkle to the seventh and tenth paragraphs of the reply were overruled.

The issues were tried by the court, a finding was made for

the plaintiff, and, over a motion for a new trial, judgment was rendered upon the finding.

Samuel Pence, James VanWinkle and Elijah J. Walden appeal, and assign as error the various rulings made by the court during the progress of the cause. These will be considered in the order in which they are presented.

The appellants insist that the complaint was insufficient, and that the several demurrers should have been sustained. The first objection made to the complaint is that the description is so indefinite that it can not be made certain by averment. We think otherwise. The only uncertainty we observe in the description is as to the location of the Jackson lot, and this is rendered certain by the averments in the complaint. That this may be done has been repeatedly decided by this court. *Torr* v. *Torr*, 20 Ind. 118; *White* v. *Hyatt*, 40 Ind. 385; *Halstead* v. *Board, etc.*, 56 Ind. 363, and authorities there cited.

A description may be so indefinite that it can not be rendered certain by averment, but this is not, in our opinion, such description.

It is further insisted that the description does not fix definitely the south line; that the west line is described as running south to the ground of the Cleveland, Columbus, Cincinnati and Indianapolis Railroad, and that the word "ground" renders the description uncertain. It is said that if the word "track" had been used instead of the word "ground" the description would have been definite, but as the company may have owned ground other than its right of way the use of such word renders the description indefinite. We do not think the use of this word renders the description void. The phrase, the ground of the railroad, evidently means its right of way, and the south line of the parcel described is upon the north line of the right of way of said railroad company. This was sufficient. *Harrison, etc., Turnpike Co.* v. *Roberts*, 33 Ind. 246. The complaint was not, for such reason, insufficient.

It is next insisted that the complaint was bad, because a

person who becomes replevin bail upon a judgment rendered upon a note secured by a mortgage, and who is compelled to pay the same, is not entitled to be subrogated to the rights of the mortgagee or any holder of the mortgage.

This position is unsupported by authority. On the contrary, it is well settled that such persons are sureties, and as such are entitled to be subrogated to the rights of the creditor in all securities held by him. *Vert* v. *Voss*, 74 Ind. 565; *Kane* v. *State, ex rel.*, 78 Ind. 103; *Downey* v. *Washburn*, 79 Ind. 242; *Gerber* v. *Sharp*, 72 Ind. 553.

The next objection made to the complaint is, that there is no averment that Alfred Walker, the judgment debtor, is insolvent; and in support of this objection it is insisted that since the judgment, paid by the appellee Armstrong as replevin bail, is continued in force for his benefit, he can not foreclose the mortgage until he has exhausted the property of Walker by execution upon such judgment.

No authority is cited in support of this proposition, and we know of none. The appellee, as we have shown, is entitled to be subrogated to all the rights of the mortgagee, or any holder of such mortgage, and if such person could have foreclosed the mortgage after he had recovered a judgment upon the note, without first exhausting the property of the judgment debtor by execution, the appellee can do the same thing. That such person could have done so admits of no doubt. These remedies are cumulative, and might, at the common law, have been pursued concurrently. Under our statute, however, a party can not foreclose his mortgage while he is prosecuting any other action for the same debt, or while he is seeking to obtain execution of any judgment in such other action; but this court has several times held that this statute does not preclude a plaintiff from foreclosing his mortgage after he has recovered a judgment for the debt; and in *Hensicker* v. *Lamborn*, 13 Ind. 468, it was held that there is nothing in the statute, or the principles of the common law, that would require a mortgagee, who has recovered a judgment

for the debt, to have an execution issued and returned unsatisfied before he can foreclose his mortgage. If such person is not seeking to obtain an execution upon his judgment, he has an undoubted right to foreclose his mortgage, and if it be conceded that equities may exist which will authorize the court to control him in the enforcement of his remedies, these need not be negatived in the complaint. This objection was not well taken.

The next objection to the complaint is urged by Elijah J. Walden. He insists that as he is presumptively a purchaser for value, the mortgage can not be reformed and foreclosed against him without an averment that he had notice of such mistake when he purchased the land, and that the averment that he had "full and actual knowledge of said mortgage," is not sufficient.

It is well settled that a mortgage which does not describe the land intended to be mortgaged can not be reformed and foreclosed against a subsequent *bona fide* purchaser of said land. It is also equally well settled that such mortgage may be reformed and foreclosed against a subsequent purchaser with notice of the mistake. This mortgage did not fail to describe the land, but the description was defective and uncertain without the aid of averments. Such descriptions, however, are not void, as they may be made certain by averment. This description was thus made certain. The southwest corner of the Jackson lot, the starting point, was alleged to be 208 feet south of lot seven (7), in Williams' second addition to the city of Anderson. This averment fixed the starting point. The starting point being fixed, the boundary line is given. It is true that the third line is described as running west from the alley, but as it is impossible to reach a point east of the starting point by running in such direction, this word must be disregarded as a false description. Dropping this word from the description, the third line runs from the alley to a point east of the starting point. This point is not fixed by the description, and hence the appellee desires

the mortgage reformed by substituting the word "north" for "west," so as to fix this point directly north of the southeast corner of said premises. Without the reformation sought, however, it is manifest that the description, as written, embraces all, or the greater portion of, the land purchased by Walden, and he is, therefore, bound by either actual or constructive notice of this mortgage, both of which are averred. The mere fact that it is necessary to reform this mortgage so as to fix definitely the northeast corner of these premises in no manner exonerates him from such consequences as notice of the mortgage imposes. If this mortgage contained no description of these premises, it could not be reformed and foreclosed against an innocent purchaser, but it does contain a description, and this description, though defective, was sufficient to put Walden upon inquiry, and thus to charge him with notice of the extent of the premises intended to be embraced in the mortgage. *McAteer* v. *McMullen*, 2 Pa. St. 32; Wade Notice, p. 138, section 319; *Parker* v. *Teas*, 79 Ind. 235. This objection, therefore, can not be sustained.

The next position taken is that the court erred in sustaining the demurrer to the 5th paragraph of the joint answer. The substance of this paragraph is that Alfred Walker, the judgment debtor, at the time the appellee became replevin bail, owned $18,000 worth of real estate in Madison county, Indiana, upon which said judgment was a lien, and that said Walker thereafter sold a large portion of said real estate to one Charles L. Henry, who agreed to pay said judgment, "and that it was then and there agreed, by and between the said Walker and Henry and this plaintiff, that said Henry should pay said judgment as a part of the purchase-money for said land."

The facts averred do not constitute a novation, as it is not shown that the appellee's claim was extinguished by the agreement. *Clark* v. *Billings*, 59 Ind. 508; *Bristol, etc., Co.* v. *Probasco*, 64 Ind. 406. The appellee, however, by the alleged agreement, obtained a promise for the payment of his claim, which

he could have enforced as a promise made to a third party for his benefit. *Fisher* v. *Wilmoth*, 68 Ind. 449; *Clodfelter* v. *Hulett*, 72 Ind. 137.

The facts stated show that the appellee has several remedies for the enforcement of his claim—one to foreclose the mortgage, another to collect by execution the judgment recovered against Walker, and the third to enforce the promise made by Henry to Walker for his benefit. These are cumulative, and either may be adopted. The existence of one does not deprive the appellee of the right to enforce either of the others. The mere fact that he could either cause an execution to issue upon the judgment, or could enforce the promise of Henry, did not deprive him of his remedy upon the mortgage. The acceptance of the promise without a relinquishment of the mortgage did not extinguish it, and so long as he retained it the mere acceptance of additional security would not preclude him from foreclosing it. It may be inequitable to foreclose the mortgage and sell the property without first exhausting the other securities. If inequitable, the most that appellants can claim is an order directing the appellee to first exhaust the other securities. This they did not ask, but pleaded the facts in bar of the action. The facts do not constitute a bar. The appellee may never be able to realize anything by an execution upon the judgment, or by a suit upon the promise of Henry, and whatever equities may exist, requiring him to first exhaust these remedies, they can not deprive him of his right to foreclose the mortgage. There was, therefore, no error in sustaining the demurrer to this paragraph of the answer..

It is next insisted that the court erred in overruling the demurrer of Samuel Pence to the second and fifth paragraphs of the reply. These were directed to the second paragraph of the answer. This paragraph alleged, in substance, that said James M. Dickson owned the land in dispute, and while he owned it, in 1872, he executed a mortgage upon it to James Van Winkle, for $3,500; that Van Winkle trans-

ferred the mortgage to James A. J. Brunt, who foreclosed the same in 1873; that upon an order of sale issued upon said decree, said land was duly sold to said Brunt, on the 2d day of October, 1875; that a certificate of purchase was duly issued to him; that he assigned said certificate to the Madison County Bank, and said bank assigned said certificate to said Pence, to whom the sheriff afterwards duly conveyed said land, and by virtue thereof he is owner of the same divested of the lien of the appellee's mortgage.

The second and fifth paragraphs of the reply allege, in substance, that within the year of redemption, and while the Madison County Bank owned the certificate of purchase, James M. Dickson transferred to said bank certain notes he then held against Alfred Walker in redemption of said property, which notes said bank accepted in full satisfaction of said certificate and in full redemption of said property.

The first objection made to these paragraphs is, that it is not averred that Dickson was owner or encumbrancer, and it is insisted that unless he was one or the other, he had no right to redeem the property. There would be much force in this objection, if it were only alleged that he had made payment to the clerk or tender of payment to the holder of the certificate, and it was insisted that such facts constituted a redemption of the property; but as it is averred that the redemption was in fact made, it is wholly immaterial by whom made. The holder had the right to accept the redemption money, and having done so the redemption is complete, whether the person by whom the payment was made was legally entitled to make it or not.

The next objection is that it is not averred that the appellant Pence had notice of the redemption at the time he purchased the certificate. This was unnecessary. He took by the assignment no greater rights than his assignor possessed. If the property had been redeemed, as alleged, the certificate was annulled, and its assignment to the appellant did not entitle him to a deed. There was no error in overruling the

demurrer to these paragraphs; nor was there any error in overruling the demurrer to the seventh and tenth paragraphs of the reply which present precisely the same question.

The motion for a new trial embraced various reasons. Among others it is insisted that the court erred in admitting in evidence the record of a deed made on the 25th day of March, 1865, to Benjamin F. Jackson, for a lot on the east side of Main street, in the city of Anderson. This deed was read for the purpose of fixing the starting point of the premises embraced in the mortgage. The objection to its introduction was that no proof had been offered to show that this was the lot mentioned in the mortgage. There was nothing in this objection. The fact that the deed purported, at a former period, to convey a lot to Benjamin F. Jackson, on the east side of Main street, in the locality in question, was enough to authorize its introduction in evidence. Nor is there anything in the suggestion that, as the appellee did not show that Jackson did not own this lot at the time the mortgage was made, he did not prove that Jackson formerly owned said lot, and hence there was a failure of proof.

It is also urged that the finding was contrary to the evidence. This position is based upon the following facts: The Indianapolis National Bank recovered judgment against Walker on the 23d day of March, 1876; on the 29th day of the same month said bank assigned said judgment to the Madison County Bank, and the appellee, on the 26th day of April thereafter became replevin bail. The appellants maintain that the assignment of the judgment did not transfer the mortgage to the Madison County Bank, and hence its payment by the appellee did not entitle him to be subrogated to the rights of any one under said mortgage. The cases of *Ward* v. *Haggard*, 75 Ind. 381, and *Kelsey* v. *McLaughlin*, 76 Ind. 379, are relied upon to support this proposition. These cases merely hold that the assignee of a judgment rendered upon a note can not, by virtue of such assignment, maintain an action against an endorser of the note. This

doctrine does not prevent such assignee from foreclosing a mortgage executed to secure such note. This was expressly decided in the case of *Holmes* v. *Hinkle*, 63 Ind. 518, and is in entire harmony with the doctrine that the recovery of a personal judgment upon a note secured by a mortgage is no bar to a subsequent suit to foreclose the mortgage.

It is also insisted that the court erred in refusing to allow Samuel Pence to testify that he had no notice at the time he purchased the certificate of sale, that James M. Dickson had transferred notes to the Madison County Bank in redemption of the property. The appellants claim that the evidence shows that Brunt owned the certificate at the time of such transfer, and that the subsequent purchase of said certificate by the bank and its transfer to him without notice entitled him to a deed, notwithstanding such attempted redemption. We think otherwise. If the means were put in the hands of the bank with which to redeem said property from the sale, and the bank then purchased the certificate, such purchase operated as a redemption of the property. *Shanklin* v. *Franklin L. Ins. Co.*, 77 Ind. 268. Under these circumstances, the bank could not claim title through such certificate, and the appellants who take the certificate subject to all equities can claim no greater rights. There was, therefore, no error in this ruling.

The remaining question arises upon the following facts: The judgment was recovered against Walker on the 23d day of March, 1876, and on the 29th of said month the Indianapolis National Bank assigned said judgment to the Madison County Bank. The appellee, on the 29th of April thereafter, and while the Madison County Bank owned said judgment, became replevin bail. After the execution of the above mortgage, Walker sold the land to Walden, who executed a mortgage upon it to secure the purchase-money. This mortgage was transferred to and held by the Indianapolis National Bank during the time it held the Walker mortgage. After the assignment of the judgment against Walker, the Indiana-

polis National Bank foreclosed the Walden mortgage, and at a sale upon such decree the appellants Pence and VanWinkle became the owners of the property.

They insist that a replevin bail upon a judgment rendered upon a note secured by a mortgage can not be subrogated to said mortgage as against any person holding a lien upon the premises at the time such person became replevin bail, though such lien is junior to the lien of the mortgage, and, therefore, the appellee is not entitled to be subrogated against them. This proposition can not be maintained. The recovery of the judgment against Walker merged the note in the judgment, but the debt was not extinguished; it remained, and the mortgage secured it in its new form, and might thereafter be foreclosed for the debt evidenced by the judgment. *Rooker* v. *Benson*, 83 Ind. 250.

As the mortgage remained as a subsisting security for and as incident to the debt evidenced by the judgment, the assignment of the judgment operated as a transfer of the mortgage to the Madison County Bank, and when the appellee paid the judgment he became entitled to be subrogated to the rights of said bank under the mortgage, and can enforce it against all persons against whom said bank could have enforced it. There can be no doubt about the right of the Madison County Bank to foreclose this mortgage against the Indianapolis National Bank, which held a junior lien, notwithstanding the fact that the latter bank held both mortgages at one and the same time; and if the Madison County Bank could do this, the appellee can do the same thing, not only as against the Indianapolis National Bank, but as against all persons who claim through such bank by virtue of such lien. The Walker mortgage is the prior lien, and the appellee, when subrogated to it, is entitled to priority, notwithstanding the fact that he became replevin bail after the execution of the Walden mortgage. These liens are separate and distinct, and the accidental circumstance that both were held by the Indianapolis National Bank at the same time in no manner affects their

priority. When the Indianapolis National Bank transferred this mortgage to the Madison County Bank, as stated, the lien retained by virtue of the Walden mortgage was junior to the Walker mortgage precisely as when executed, and we are at a loss to know upon what principle of equity the Indianapolis National Bank, or any person holding under it, can claim priority over any person entitled to subrogation under the Walker mortgage. If both mortgages secured the same debt, or each secured a part of the same debt, the rule would be different, as the first in such case would not be entitled to be subrogated to the security as against the holder of the mortgage, until the entire debt should be paid. This was decided in *Zook* v. *Clemmer*, 44 Ind. 15, *Vert* v. *Voss*, 74 Ind. 565, and *Rooker* v. *Benson*, *supra*. This is not, however, the case. For these reasons we are of opinion that the appellee's claim is superior to the claim of appellants under the Walden mortgage. The motion for a new trial was, therefore, properly overruled.

We have now examined all the questions discussed, and as no error appears in the record the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion that the judgment be and it hereby is in all things affirmed, at the costs of appellants.

Filed Jan. 11, 1883.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—It is contended in the argument on the petition for a rehearing, that the opinion heretofore pronounced does not correctly lay down the law upon the subject of subrogation. Counsel affirm that a replevin bail upon a personal judgment rendered on a debt secured by mortgage can not be subrogated to the mortgage lien, in cases where the creditor acquires a junior mortgage upon the same property. This position is not tenable.

The general rule is that where a replevin bail pays a judg-

ment, he is entitled to the benefit of all securities held by the creditor. This general rule, like most general rules, is not without exceptions, and one of these exceptions is that the right to subrogation does not exist unless the surety pays the entire debt secured by one and the same lien. *Zook* v. *Clemmer*, 44 Ind. 15; *Vert* v. *Voss*, 74 Ind. 565; *Rice* v. *Morris*, 82 Ind. 204. But where the debts are entirely separate and distinct, and are secured by different and independent mortgages, the principle declared in the cases cited does not apply. These cases do not decide that a replevin bail must pay all debts, or all liens, but do decide that he must pay all of the particular debt secured by one mortgage.

Subrogation is allowed only in cases where it will work equity and do no injustice. The right to subrogation is not a fixed legal right, but is an equitable one framed by courts of equity for the purpose of promoting the just administration of equitable principles. It is everywhere conceded that it can not prevail in cases where its operation would violate "equity and good conscience."

There are cases holding that a replevin bail is not entitled to subrogation in cases where it will operate to the injury of those who had acquired rights prior to his undertaking, but we do not think those cases rule here, for the reason that the right of the bail was to the mortgage as it existed in the hands of the creditor at the time the undertaking was entered into, and this carried his rights back to the date of the mortgage. The lien of the mortgage was not broken by the personal judgment taken for the debt, nor was the time of the inception of its lien changed in any particular. It was a lien in the hands of the creditor, from the time of its execution, and, as against the creditor, continued to be such a lien, or else ceased to be a lien at all. There was no interim in which the lien of the mortgage was dead, nor was there, either in legal contemplation or in reality, a second mortgage. The lien to which the appellee was substituted was that of the mortgage, precisely as it originally accrued.

Our decisions firmly settle the law to be that, under our statute, the rights and liability of the replevin bail are those arising out of the undertaking and the original judgment. His liability is determined, not by the law in force when he undertakes as bail, but by the law in force when the judgment was rendered, that is, he became bound by the original judgment according to its force and effect under the law in force at the date of its rendition. *Hutchins* v. *Hanna*, 8 Ind. 533; *Doe* v. *Harter*, 2 Ind. 252; *Doe* v. *Dutton*, 2 Ind. 309. It is therefore but just that his rights should be coeval with his burdens. In *Colgrove* v. *Cox*, 22 Ind. 43, it was held that the replevin bail's right of subrogation was superior to that of general creditors and to that of junior encumbrancers, and this principle decides the present case. The reasoning of the court was this: "The senior judgment would be a superior lien upon the debtor's property—would have to be first satisfied. The fact that the day of such satisfaction, from such property, should be delayed by staying the execution, can not, in view of numerous decisions relative to the laws controlling the remedy, substantially affect the rights of any creditor. Then if the judgment is not paid the property is swept off from the junior creditors to satisfy the same; if the bail pays it, and the property goes for his benefit, it is at last but in discharge of that superior lien, to which, under this construction, such bail had a right to look when he became a party." This decision has stood for many years, rights have grown up under it, and we should sustain it unless the clearest convictions of duty require us to break it down. We are by no means satisfied that the decision is erroneous.

Our statute provides for the entry of replevin bail, and gives a general right of subrogation. All contracts made, and all acts done, are conclusively presumed to be made and done under this law. It enters as a silent but potent factor into all affairs involving the duty and liability of replevin bail. The appellants were, therefore, bound to know, when they took their judgment, that there was a right to enter bail, and were

bound, also, to know the legal effect of the undertaking of bail, and the character of the rights of the person becoming bail. If they, by their own act, imperiled a junior lien they can not complain because the surety avails himself of a right secured by law.

The undertaking of a replevin bail is, under the statute, a matter of record, and is in this respect different from an ordinary contract of suretyship, where no record gives notice of its existence or character. A record notice is effective, not only as to the existence of the thing recorded, but also of its legal force and character. If a record fixes the rights of parties under the statute, then all persons acquiring an interest in the property are bound to know the effect of the contract, or deed, found in due form of law upon the public records.

In still another particular the case differs from one of ordinary suretyship. The law provides that a mortgage lien is not discharged by a personal judgment for the debt secured by the mortgage. *Hensicker* v. *Lamborn*, 13 Ind. 468; *O'Leary* v. *Snediker*, 16 Ind. 404. Here, then, was a mortgage securing the debt for which the bail became responsible, and this lien was neither merged nor interrupted by the personal judgment. A judgment neither merges nor impairs the mortgage lien. *Manns* v. *Brookville National Bank*, 73 Ind. 243; *Evansville, etc., Co.* v. *State, ex rel.*, 73 Ind. 219 (38 Am. R. 129); *Teal* v. *Hinchman*, 69 Ind. 379; *Lapping* v. *Duffy*, 47 Ind. 51; *Helmbold* v. *Man*, 4 Whart. (Pa.) 410; *Stahl* v. *Roost*, 34 Iowa, 475; *Riley* v. *McCord*, 21 Mo. 285; *Priest* v. *Wheelock*, 58 Ill. 114. The lien, therefore, enured to the benefit of the replevin bail, neither interrupted nor postponed by any act for which he was responsible. These considerations plainly distinguish the case from that of an ordinary surety.

The case of *Fishback* v. *Bodman*, 14 Bush, 117, decides that a judgment for purchase-money merges the equitable vendor's lien, and, therefore, the bail can not invoke the benefit of the lien. It is obvions that this principle can not rule here, for the plain reason that the judgment did not

merge the mortgage lien, but left it in undiminished vigor. In *Patterson* v. *Pope*, 5 Dana, 241, the person who asserted a right of subrogation was a surety on an injunction bond, and his position was not like that of a replevin bail under our statute, so that even conceding that the decision is sound, it does not apply to this case. But its soundness may well be doubted, for a carefully considered case asserts a doctrine directly opposite to that which it lays down. *Rodgers* v. *McCluer*, 4 Gratt. 81. The decision in *Armstrong's Appeal*, 5 W. & S. 252, is that a surety on a judgment, who hinders its enforcement by his undertaking, can not assert the judgment lien against subsequent judgment creditors, but this can not be good law where a statute, like ours, gives a right of subrogation and keeps the judgment alive for the benefit of the bail. The general doctrine of the case cited is opposed by *Watts* v. *Kinney*, 3 Leigh, 272, so that here, again, there is conflict. Strongly in point, in favor of our holding in the former opinion, is the case of *Drew* v. *Lockett*, 32 Beavan, 499, where it was said: "I am of opinion that a surety who pays off the debt for which he became surety must be entitled to all the equities which the creditor, whose debts he paid off, could have enforced, not merely against the principal debtor, but as against all persons claiming under him." In *Nunemacher* v. *Ingle*, 20 Ind. 135, it was held that a replevin bail for a debt secured by mortgage was not released by an order directing a return of execution, and the decision was placed upon the ground that the bail was secured by the mortgage lien, of which the court said: "The mortgage was a lien having its due priority." If it be true that the postponement did not release the bail because of the existence of the mortgage lien, then it must also be true that he succeeds to the lien in all its force and vigor. This well comports with the well known rule that a creditor who destroys or impairs a lien securing a debt, releases the surety to the extent of the value of such lien. The doctrine of some of the cases cited can not possibly be reconciled with this gen-

eral rule. In holding as we do, that the replevin bail was subrogated as against the junior mortgage acquired by the creditor, we are sustained by our own cases and by the general rule recognized by the courts and text-writers. *Gerber* v. *Sharp*, 72 Ind. 553, and authorities cited. *Kane* v. *State, ex rel.*, 78 Ind. 103.

The record gave notice of the character of the undertaking of the replevin bail and of the mortgage which secured the debt evidenced by the judgment, and the purchaser at the sale on the junior mortgage was bound to take notice of the facts disclosed by the record. Having this notice he can not be permitted to assert, to the injury of the bail, that his purchase gave him a paramount title. He bought with the notice imparted by the record, and can not displace prior rights.

The mortgaged property could not have been sold on execution. Although a mortgagee may obtain a personal judgment without foreclosing his mortgage, he can not sell the mortgagor's equity of redemption. R. S. 1881, section 1105. The bail could not, therefore, have compelled resort to the mortgaged property; he was bound to pay the judgment, and when he did this he acquired a right to the lien as it existed when he became replevin bail.

In *Jones* v. *Tincher*, 15 Ind. 308, it was held that a surety could not compel a creditor to resort to mortgaged property, but that the surety's course was to pay the debt, and that he would, thereupon, as the court said, "be subrogated to the plaintiff's rights under the mortgage." The appellants having, by their own conduct, made it legally impossible to seize the mortgaged property on the judgment, are not in a situation to insist that the replevin bail is confined solely to the judgment lien.

The right of a surety to subrogation is not dependent upon the question of the solvency or insolvency of the debtor. When he pays all of a debt secured by a lien, he is entitled to be subrogated to the rights of the creditor, irrespective of

the financial condition of the debtor. Sureties are favored in law and in equity, and they are not bound to forego the benefit of a specific lien on real property and assume the hazard of collecting the money they have been compelled to pay by ordinary legal process. No such risk is put upon them.

The contention of counsel that the surety must show the insolvency of the principal debtor is proved to be without merit when it is brought to mind that the law requires the creditor to first exhaust the property of the principal debtor before forcing payment from the surety. *Edwards* v. *Haverstick*, 53 Ind. 348; *Elson* v. *O'Dowd*, 40 Ind. 300. If the appellants desired to prevent the lien from fastening on the mortgaged property, they should have levied their judgment upon other property of the principal debtor, instead of forcing the replevin bail to pay the judgment. It was for them, if there was other property of the principal debtor, to seize it in satisfaction of their debt, before falling on the surety, and there is, therefore, no equity in their claim that the surety, who has paid the debt, should cast about for property. They are in the position of demanding that another should do that which they themselves should have done. Petition overruled.

Filed April 26, 1884.

95 210
125 171
125 500
95 210
140 645

No. 11,368.

PORTER *v.* JACKSON ET AL.

WILLS.—*Devise.—Legacy.—Equitable Lien.*—When lands are devised to one who, by the will, is directed to pay a legacy, the legacy is a charge upon the lands devised, and when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee which may be enforced without resorting to the land, the lien still remaining as a security.

SAME.—*Receiver.—Complaint.—Appeal, Plea in Bar of.*—Lands devised to several, on condition that if they took they should pay a certain legacy, were, upon suit for partition to which the legatee was not a party, sold by a commissioner by order of the court, for full value, paid upon being

appraised as unencumbered. While the money remained in the custody of the court, the purchaser brought suit against the devisees and legatee to quiet his title as against any lien for the legacy, or to charge it primarily on the fund in the custody of the court, averring the foregoing facts by his complaint, and also that the devisees were insolvent.

Held, that the complaint was good on demurrer, to compel resort to the fund in court primarily to satisfy the legacy, and for the appointment of a receiver to take charge of the fund and so apply it, unless the devisees would secure such application by sufficient bond.

Held, also, that a plea in bar of the appeal to the Supreme Court by the plaintiff below, averring that after the appeal he purchased the shares of some of the devisees in the fund in court, was bad on demurrer.

From the Decatur Circuit Court.

F. Winter, *J. D. Miller* and *F. E. Gavin*, for appellant.

W. A. Moore, *M. D. Tackett*, *B. F. Bennett*, *J. K. Ewing* and *C. Ewing*, for appellees.

ZOLLARS, J.—The will of William Jackson was probated in 1869. By this will, the testator gave to his wife all of his property, real and personal, so long as she should remain his widow. Upon her marriage or death the property was devised to his seven children, one-seventh to each. The will contained the following provision: "I further will that, as a condition of the acceptance of the property thus devised to my heirs, they, on their part, shall support and maintain Eliza Andrews, during her natural life, or until she shall marry."

The widow died intestate, in March, 1882. There was no administrator upon the estates of the testator nor widow.

It does not appear that any of the personal estate came into the hands of the devisees. After the death of the testator, Mrs. Clark, a daughter and one of the devisees, died intestate, leaving surviving a husband and six minor children. In April, 1882, appellee Samuel L. Jackson instituted an action for a partition of the land devised. All of the living devisees, and the said heirs at law of Mrs. Clark, were made parties defendants. Eliza Andrews was not a party. An interlocutory judgment was made, fixing the rights and interests of the several parties to the action, and ordering a

partition. Subsequently, such proceedings were had that a commissioner was appointed to sell the land. Under and pursuant to the order of court, the commissioner had the land appraised as unencumbered, and on the 27th day of October, 1882, sold the same, at public sale, for the full amount of the appraisement, viz., $5,425. Appellant was the purchaser. The sale was reported to and confirmed by the court in December, 1882. At that time, a deed to appellant was ordered, executed by the commissioner, and approved by the court. The proceeds of the sale were in the hands of the commissioner when this action was commenced. Prior to the commencement of this action, a controversy arose as to the proper construction of the will. Eliza Andrews claimed that the will made her support a charge upon the land, although she had the right also to look to the devisees personally. The devisees claimed that the land was the primary and only fund to which Eliza Andrews could look for such support.

Appellant claimed that the land is not liable at all, having been sold and he having purchased without actual notice, and that, if liable at all, it is only in the way of security, and that the legatee, Andrews, must resort first to the personal liability of the devisees and the fund in the hands of the commissioner.

These are the facts, substantially, as set up in appellant's complaint. In addition to these facts, it is charged in the complaint that the devisees living and the heirs of Mrs. Clark, are all insolvent, and that some of them are intending to remove from the State.

This action was commenced against the devisees living, the heirs of Mrs. Clark, and Eliza Andrews, to quiet the title to the land as against all claim for the support of the legatee Andrews, and to charge that support upon the devisees and the fund in the hands of the commissioner. The main purpose of the action, as shown by the complaint and the argument of appellant's counsel, is to charge the support

upon the fund thus in the hands of the commissioner, and to require the devisees, if allowed to draw the fund, to give bond that the amount of it shall be applied to that support, if required; or that the court appoint a receiver to take charge of the fund for the benefit of the legatee. After the commencement of this action, Eliza Andrews was adjudged insane, and a guardian appointed for her. The guardian was made a party defendant. Demurrers to the complaint were filed by all of the defendants, which were sustained.

Do the facts stated make a case for any such relief as is asked? To narrow the case to the real question discussed by counsel, and the only one we need decide on this appeal, Has appellant, upon the facts stated, a right to an order and decree for the retention of the funds in the custody of the court, for the support of the legatee, or has he a right to an order and decree, that in case the devisees are allowed to receive that fund, they shall give a bond or bonds that it shall be applied to the support of the legatee, if required?

We learn from appellees' answer to appellant's assignment of errors in this court, that since this appeal was taken the commissioner has made his final report to the court below, in which he states that appellant purchased of two of the devisees their interest in the fund, arising from the sale of the land, and retained out of the purchase-money for the land, the amount of the interests thus purchased. We do not think that this is sufficient to bar the appeal. Nor do we think that this fact would have affected appellant's right to the relief asked, had it appeared in the complaint, if he was otherwise entitled to such relief. As to whether or not, in any possible future controversy, the purchase from the devisees may affect rights as between them and appellant, we need intimate no opinion.

The will, as we have seen, provides that as a condition of the acceptance of the property devised, the devisees shall support and maintain Eliza Andrews. The rule is well settled that, where real estate is devised to the person who, by the

will, is directed to pay a legacy, such legacy is an equitable charge upon the real estate so devised. *Lindsey* v. *Lindsey*, 45 Ind. 552; *Wilson* v. *Piper*, 77 Ind. 437; *Cann* v. *Fidler*, 62 Ind. 116; *Wilson* v. *Moore*, 86 Ind. 244; *Castor* v. *Jones*, 86 Ind. 289; *Nash* v. *Taylor*, 83 Ind. 347.

This is conceded by counsel in this case. It is further conceded, in argument, that as the will was probated and of record, and as Eliza Andrews was not a party to the partition proceedings, the equitable charge for her support was not destroyed by the sale to appellant.

We think it equally clear that the acceptance of the property, under the will, imposed a personal obligation upon the devisees to furnish the support to the legatee, and that she may enforce that obligation by a suit, and recover a personal judgment. The acceptance of the property under the will implied a promise to furnish the support. That support seems to have been the consideration for the property devised. It is expressly made the condition to the vesting of the title to the property. It seems to be plain that the testator intended to impose a personal charge upon the devisees.

In the case of *Harris* v. *Fly*, 7 Paige, 421, which arose under a will similar to that under consideration, Chancellor WALWORTH, in speaking of the legacy, and the liability of the devisee, said: "By the will, the payment thereof is charged upon him personally; and he has received the land as an equivalent for the payment thereof, although for the protection of the rights of the legatees, this court gives them an equitable lien upon the land itself as an additional security." This case was cited and approved by this court in the case of *Lindsey* v. *Lindsey*, *supra*. The same doctrine was held in the case of *Cann* v. *Fidler*, *supra*.

The case of *Burch* v. *Burch*, 52 Ind. 136, was an action by a legatee against a devisee of the land for the amount of the legacy. It was held that while the legacy was a charge on the land devised, the devisee was also personally liable upon an implied promise to pay. See, also, the cases cited in this

case. *Dodge* v. *Manning*, 11 Paige, 334; S. C., 1 N. Y. 298; *Elwood* v. *Deifendorf*, 5 Barb. 398; *Fuller* v. *McEwen*, 17 Ohio St. 288.

In the case of *Towner* v. *Tooley*, 38 Barb. 598, which arose under a will similar to that under examination, it was said that the legacies were an equitable charge on the land, but that before resort could be had to the land the personal property of the devisee should be exhausted.

The case of *Lofton* v. *Moore*, 83 Ind. 112, was between the legatee and devisee, and arose under a will which, in specific terms, bound the real estate devised for the payment of the legacy. The holding was that the devisee was personally liable, and that the legatee might, in the first instance, proceed to collect the legacy by enforcing the lien upon the land.

The case of *Brown* v. *Knapp*, 79 N. Y. 136, arose under a will similar to that in suit. It was said that, "If the devisee accepts the devise, he becomes personally bound to pay the legacy, and he becomes thus bound even if the land devised to him proves to be less in value than the amount of the legacy. If he desires to escape responsibility, he must refuse to accept the devise. If he does accept, he becomes bound to pay the whole amount of the legacy which he is directed to pay."

Under the provisions of the will, and in the light of the above authorities, we think it is very clear that the devisees are personally bound to furnish to Eliza Andrews the support provided in the will, and that she may enforce that liability by suit, even beyond the value of the land devised if necessary, and without resorting to the land at all, if the amount can be made by such suit or suits. Whether the devisees could compel her to thus resort to their personal liability before having resort to the land, if they still owned it, we need not decide.

We think it clear also that the charge upon the land remains an equitable charge upon the fund in the hands of the commissioner and in the custody of the court, and that she may enforce that charge. Especially is this so, as the devi-

sees are liable beyond the value of the land, and are insolvent. She may enforce the personal liability against the devisees, and still look to the land if necessary. See analogous cases, *Gimbel* v. *Stolte*, 59 Ind. 446; *Clyde* v. *Simpson*, 4 Ohio St. 445; *Milligan* v. *Poole*, 35 Ind. 64; *Harris* v. *Fly*, *supra*.

The case last cited involved the rights of parties under a will substantially like that before us. The devisee had suffered the land devised to be sold by the sheriff on an execution. After the purchaser had received a deed, he mortgaged the land. In an action to foreclose the mortgage, the legatees were made defendants. It was held that the legacies were a lien upon the land, and that the legatees were entitled to be paid their legacies out of the proceeds of the sale of the land.

May appellant compel Eliza Andrews to resort to and exhaust that fund, before having resort to the land? It would seem that, upon principles of equity and good conscience, he ought to have that right. As we have seen, the devisees personally owe the duty of furnishing the support to the legatee. They received the land devised as a compensation for such support. They held the land charged as security for that support. Appellant has paid the full appraised value of the land, without reference to any charge upon it, and, so far as shown, without actual notice. The devisees are insolvent, and hence, at this time, either the fund in the custody of the court, or the land in the hands of appellant, must bear the burden of the support. As between appellant and the devisees, the equity seems clear. No possible harm can come to the legatee by charging the fund as the primary fund for her support. On the other hand, it may result in a positive advantage to her.

In the case of *Clyde* v. *Simpson*, *supra*, it was held that the purchaser of the land from the devisees not only had the right, but that it was his duty to see to it that the purchase-money was applied in payment of the legacy, in order to protect his land.

The case of *Dodge* v. *Manning*, 11 Paige, 334, cited in *Lindsey* v. *Lindsey* and *Burch* v. *Burch*, *supra*, arose under a

will substantially like that before us. The devisee became the owner under the will of both real and personal property. He mortgaged the real estate. The mortgage was foreclosed, and the property sold. A portion of it was purchased by a third party, with notice, and a part was purchased by the devisee. The legatee filed a bill to enforce the charge on the lands. It was held that while the legacy was a charge on the land, the personal estate bequeathed was the primary fund for the payment of the legacy, that the devisee was personally liable, and that the portion of the land purchased by him, at the master's sale, should be charged and sold for the payment of the legacy, before the legatee could have recourse upon the land purchased by the third party. As to that party the bill was dismissed.

This same case came before the Court of Appeals, and is reported in 1 N. Y. 298. The decision was the same, except that part dismissing the bill. The court said: "But the devisee, by accepting the real and personal estate devised and bequeathed to him, became personally liable for the payment of the legacies which the will directed him to pay. He is therefore primarily liable, and the remedy should first be exhausted against him and the real and personal estate of the testator remaining in his hands, before the respondents should be charged in respect to the real estate purchased by them. If they had purchased expressly subject to the payment of the legacy, that of itself might have made the estate in their hands directly and primarily chargeable. But I concur with the chancellor that there is nothing in the evidence to justify the inference that they purchased in that manner. The admission in their answer, as well as the evidence, merely shows that they had notice of the existence of the legacy. * * * * But as the chancellor's decree directs the bill to be dismissed, as to the respondents, with costs, it should be reversed, and a decree should be entered charging the lands purchased by them with the payment of the legacy and costs of suit, so far as there may be a deficiency after the appellant shall have ex-

hausted her remedy against the defendant, John B. Borst." Borst was the devisee.

In the same case, in speaking of the rights of the legatee, who was complainant and purchaser, JEWETT, C. J., said: "But as between the complainant and the defendants, * * * they have an equitable right as against her, to insist that she shall first exhaust her remedy, not only as against Borst personally, but as against that portion of the property, real and personal, remaining in his hands, or to which he is entitled, before she can enforce her lien as against that portion of the property purchased by them on the sale under the mortgage foreclosure." On this point, see also the case of *Towner* v. *Tooley*, 38 Barb, 598, already cited.

In the case of *Elwood* v. *Deifendorf*, 5 Barb. 398, heretofore cited, it was held, under a will which devised the land charged with the payment of the debts of the testator, that the devisee, by accepting the land, became personally liable to pay the debts; that the remedy of the creditors must first be exhausted against the devisee personally, before their lien could be enforced against the portion of the land in the hands of the alienee of the devisee, and that the real estate was liable in the inverse order of its alienation. See, also, 2 Story Eq., sec. 1127.

Many other cases might be cited in support of the equitable doctrine of the above cases. There is clearly no principle of equity that the devisees can invoke in support of their claim, that they shall receive the purchase-money for the land, and leave the whole burden of the support of Eliza Andrews to rest upon that land and the purchaser of it. Nor can any equitable or other good reason be given why the legatee should not be compelled to look to the fund in the custody of the court before resorting to the land in the hands of appellant. Neither the record nor counsel inform us that she objects to this. Her demurrer was filed, possibly, because of one prayer of the complaint for the quieting of

the title to the land against the charge on it for her support. However this may be, we think that appellant has the right, as against her and the devisees, to have that fund first exhausted, if necessary, in her support, before resort shall be had to the land which he purchased in good faith, and for full value, and he is entitled to such an order and decree as will accomplish this, either by good and sufficient bonds of indemnity from the devisees, or the appointment of a receiver to take and hold the fund now in the custody of the court. Having purchased the interest of two of the devisees, appellant will hold the amount subject to its proportionate share of the support of the legatee. As to her, it is secure, being a charge upon the land. In answer to this, the position of the appellees is that the sale under the partition proceedings was a judicial sale in which there was no warranty, and in which the doctrine of *caveat emptor* applied; and that, therefore, appellant's land must stand for the support and maintenance of the legatee, to the exoneration of the devisees.

We have a line of cases which hold that there is no warranty in judicial sales, and apply the doctrine of *caveat emptor*. But these cases, we think, have not such scope as to overthrow the equitable doctrine we have announced, in its application to this case. On the other hand, we have a line of cases extending from the case of *Muir* v. *Craig*, 3 Blackf. 293, to the case of *Short* v. *Sears*, 93 Ind. 505—over a period of fifty years—which hold that a purchaser of land at a sheriff's sale, to which the judgment defendant has no title, or where the sale is void, may recover from the judgment defendant the amount so paid, or be subrogated to the rights of the judgment creditor. The same rule has been applied to other judicial sales. See *Muir* v. *Berkshire*, 52 Ind. 149; *Westerfield* v. *Williams*, 59 Ind. 221; *Willson* v. *Brown*, 82 Ind. 471.

This line of cases rests upon principles of equity, and is more analogous to the case in hearing than those relied upon

by appellees. In this line the doctrine of *caveat emptor* has not been so extended as to deny a remedy against him who is the real debtor, or who owes the duty.

It has been suggested that there is an apparent conflict between this line of cases and the other, which can not be readily reconciled on principle. *Weakley* v. *Conradt*, 56 Ind. 430. The observation made by Mr. Justice WORDEN, in that case, may be applied generally. It will be observed upon an examination of the two lines of cases, that, generally, protection was given or denied to the purchaser, as the vendors, or those interested as vendors, did or did not owe the debt or duty.

The case of *Henderson* v. *Whitinger*, 56 Ind. 131, is based upon this principle. In that case the land was sold by the administrator. The purchaser defended against one of the notes given for the purchase-money, on the ground that when he purchased the land it was encumbered with taxes, which he had been compelled to pay. The holding in the case, in effect, was that if the taxes had accrued during the life of the intestate, they would have been a charge against him, which it would have been the duty of the administrator to pay, and that, in such case, the purchaser might have availed himself of his payment of them as a defence.

Without further extending this opinion, it follows, from the conclusion we have reached, that the demurrer to the reply must be carried back and sustained to the answer filed in this court, and that the judgment of the court below must be reversed. The judgment is therefore reversed, with costs, and the cause remanded, with instructions to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

Filed April 25, 1884.

No. 10,821.

DWENGER, BISHOP, *v.* BRANIGAN.

REAL ESTATE.—*Equitable Vendor.*—*Lien.*—*Volunteer.*—Where B. furnished the money and paid for certain real estate for the use of a church as a parsonage and dwelling for the priest of such church, under an agreement that he was to have and hold such real estate and a specific lien thereon, and the equitable title thereto, until the money so furnished was repaid to him; and where, under such agreement, by the procurement of B. and in conformity with the polity of the church, the deed of the real estate was made direct to D., a bishop of such church, who was a mere volunteer and paid nothing for such real estate,

Held, that practically, as between B. and D., the former was the equitable vendor, and the latter was the vendee, of such real estate.

Held, also, that for the amount of money so furnished and paid by B. in the purchase of the real estate, and remaining unpaid, he had the equitable lien of a vendor, and could enforce the same against the real estate in the hands of D.

From the Tippecanoe Circuit Court.

T. B. Ward and *W. P. Breen*, for appellant.

R. P. Davidson and *J. C. Davidson*, for appellee.

HOWK, C. J.—This suit was commenced by the appellee against the appellant, in the Boone Circuit Court. Afterwards, upon appellee's request, the venue was changed to the court below. There the cause was put at issue and tried by a jury, and a general verdict was returned for the appellee, assessing his damages at $1,240, "and that the same is a lien on the lot described in the complaint." With their general verdict the jury also returned into court their special findings on particular questions of fact submitted to them by the court, with the consent of the parties. Over the appellant's motion for judgment in his favor on the special findings of fact, notwithstanding the general verdict, and his motion for a new trial, the court rendered judgment against him for the appellee upon and in accordance with the general verdict.

The first three errors assigned by the appellant in this court are the overruling of his demurrers to each of the second,

third and fourth paragraphs of appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action. Appellee's complaint contained four paragraphs; but, with leave of the court, the first paragraph was withdrawn before the trial of the cause.

In the second paragraph of his complaint the appellee alleged that, on the 4th day of January, 1880, at the special instance and request of the appellant, the appellee furnished appellant the sum of $1,500, for the purpose of being invested by him in the real estate in Boone county, Indiana, described as lot No. 3, in block No. 13, in the town of Lebanon; that at the time the appellant so received such sum of $1,500, it was mutually agreed between him and the appellee that the same should be a special lien in appellee's favor on said real estate; that, because of such agreement and for no other or different reason, the appellee furnished the appellant the said sum of money, under said agreement, and invested the same in such real estate, and thereupon a deed thereof was made to the appellant; that the appellant still held such real estate, subject to such claim and lien of the appellee; that the appellant had failed to repay to the appellee the said sum of $1,500, or any part thereof, but the same was due and remained unpaid; that at the time the appellee furnished and paid the said sum of money as aforesaid, and at the time of purchase of such real estate and of the execution of said deed, it was agreed by and between appellee and the appellant that the appellee should have, hold and retain the equitable title in and to said real estate, and have and hold his special lien on the same for the said sum of money, until the same should be repaid to him. Wherefore the appellee demanded judgment for the sum of $1,500, and that the same be adjudged and decreed a lien on such real estate, and that the same be sold, etc.

In the third paragraph of complaint appellee averred that, on January 4th, 1881, it was mutually agreed by and between him and the appellant, one Timothy Ryan acting as agent for

and on behalf of appellant, that appellee should furnish the appellant, through his agent, Ryan, the sum of $1,500, for the purpose of purchasing the same real estate described in the second paragraph, which real estate and the dwelling-house thereon were to be so purchased for the use of the congregation of the church of St. Charles Borromeo, of the Catholic Church of Lebanon, as a parsonage and dwelling for the priest of such church; that it was further mutually agreed by and between appellee and appellant, said Ryan acting as appellant's agent in said agreement, that for and in consideration of appellee's procuring for appellant, and letting him have the said sum of money, and for no other or different consideration, the appellant, by his agent, Ryan, would purchase said real estate for the purpose aforesaid, and appellant should take the deed of such real estate in his own name; that it was also agreed by and between appellee and appellant, and his agent, Ryan, at the time of the payment by appellee of said sum as purchase-money of said real estate, and at the time of the execution of said deed to appellant, that the appellee should have and hold an equitable title in and to such real estate, and a special lien thereon, until such sum of money was repaid to him, and the appellant was to hold such real estate in trust, and for the use of appellee, until he should be repaid said sum of money. This paragraph then stated the appellee's performance of his part of the several mutual agreements recited, and the failure of the appellant, and of his agent, Ryan, to comply with such agreements, substantially as the same facts were stated in the second paragraph of complaint.

In the fourth paragraph of his complaint the appellee states the same cause of action, and demands the same relief as in the previous paragraphs, but in somewhat different language. We take the following summary of the fourth paragraph from the brief of appellant's counsel:

"The fourth paragraph alleges that Ryan was priest, and appellant bishop, etc., as in third paragraph; that Ryan wished to purchase the lot described for a parsonage, and made said

purchase, the deed being taken to appellant; that Ryan, not having the necessary means, applied to the appellee for help; that appellee, as agreed with Ryan, was to furnish the money, 'in whole or in large part,' to Ryan to pay for the lot, the deed to be made to the appellant; but the appellee was 'to stand in relation of vendor,' and to have a vendor's lien on the lot; that Ryan bought the lot for $1,500, but took it subject to a mortgage of $250, which was to be deducted from the purchase-money; that, in order to raise the money, the appellee procured a loan of $1,500 from the bank, and gave the money to Ryan to pay the vendor of the lot; that Ryan afterwards paid $600 on the note given for $1,500, of which sum $40 was applied to the interest, and the appellee afterwards paid to the bank $1,020, being the balance of the note; that having full confidence in Ryan, 'he neither took nor asked any evidence in writing of his said agreement;' that appellant took the title subject to appellee's equitable lien, paid nothing for it, holds it as church property, and, on demand, refuses to recognize appellee's claim; that Ryan is a non-resident and insolvent. Prayer for a decree giving appellee a lien on the lot, etc."

No specific objection is pointed out, in argument, to either one of these paragraphs of complaint, by the appellant's learned counsel; but each and all of the paragraphs are assailed, upon the broad ground that they each fail to show any such claim to or lien upon the real estate, in appellee's favor, as a court of equity can or ought to enforce. We are of opinion, however, that the facts stated in each of said paragraphs of complaint were sufficient to withstand the appellant's demurrer thereto. It is first claimed by the appellant's counsel, that, "If any cause of action is shown in favor of the appellee, it is exclusively founded on the note of Ryan and appellee to the bank, which note was paid by the appellee." Counsel then say: "There is no copy of this note in the complaint, or elsewhere in the record. If the proposition, that the note was the only basis of the plaintiff's right of action, be correct,

then the complaint in each of its paragraphs is clearly defective, and the demurrers should have been sustained; because neither the note nor a copy thereof is set out." The difficulty with this argument of counsel is that the "proposition" on which the agreement is founded is wholly incorrect. It is a mistake to say, that the appellee's cause of action, as stated in either paragraph of his complaint, is in any respect "founded on the note of Ryan and the appellee to the bank, which note was paid by the appellee." Such a note is not mentioned, or even alluded to, in either paragraph of appellee's complaint, and it can not be said with any degree of legal accuracy, that such note, if it exist, is the foundation of appellee's complaint. Under the code, it is only when a pleading is founded on a written instrument, that "the original, or a copy thereof, must be filed with the pleading." Section 362, R. S. 1881; *Sinker, Davis & Co.* v. *Fletcher*, 61 Ind. 276.

It is next insisted by the appellant's counsel, "that the whole record shows that the appellee has no right, such as is given him by the decree." That is, as we suppose, that upon the facts stated in the complaint, and shown by the evidence, the appellee had no claim to or lien upon the real estate in controversy, such as can be enforced by the decree of a court of equity. It is claimed that there is no charge of fraud against the appellant in either paragraph of the complaint. Certainly, that is true; for each paragraph was manifestly prepared on an entirely different theory, and it was not necessary to charge the appellant with fraud. Appellant's counsel also insist, "that a vendor's lien must result from implication of law, and can never be the outgrowth of promise or agreement." Upon this point, counsel cite *Boyd* v. *Jackson*, 82 Ind. 525, wherein it is said: "While a vendor's lien results, by implication of law, from certain transactions between parties, and not from any agreement between them, and is presumed to exist in all cases in which such a lien is allowed by law, yet whether the lien which the law has conferred

has been in fact continued in existence, is a matter of intention, as manifested by all the circumstances attending each particular case."

It can hardly be said, that the case cited supports the position of appellant's counsel, if we understand them correctly; for a vendor's lien does not result *from* an implication of law, but from certain transactions between parties *by* implication of law. Where a vendor's lien does result from the transactions of parties, by implication of law, it can not be said that such lien would be impaired, invalidated or destroyed, by reason of any "promise or agreement" of the parties, for the creation or continued existence of such lien. For, in the case last cited, it was held that the declarations of the parties, in regard to a vendor's lien, were "relevant to the question of the intention of the parties respectively, and hence not erroneously admitted by the court."

Upon the facts of this case, as stated in the complaint and shown by the evidence, we are of the opinion that the appellee had and held such a claim to and lien upon the real estate described in his complaint as a court of equity might and ought to enforce in his favor against the appellant. The money was furnished, for the purchase of the real estate, by the appellee. He was to have and hold the property and a specific lien thereon, and he was to have the equitable title thereto until the money furnished was repaid to him; and under this agreement, by his procurement and in conformity with the polity of his church, the deed of the real estate was made direct to the appellant. Practically, as between the appellee and the appellant, the former was the vendor and the latter the vendee of the real estate. In *Johns* v. *Sewell*, 33 Ind. 1, one of the questions in the case was this: Whether the equitable lien for purchase-money exists when the actual vendor held only a title in equity, and the conveyance was made direct, as in this case, from the party holding the legal title in trust? In considering this question the court said: "Where a purchaser has paid the whole purchase-money, he is, in equity,

regarded as the real owner of the land for every purpose. He is so in very substance, and a conveyance to him is but a compliance with a form of law. It would be a surprising doctrine, that a court of equity would so stick upon form, in utter disregard of right, as to deny to him the implied lien for purchase-money, which it would give if he had held also the legal title. No such distinction is hinted at in the text-books, and we are unable to conceive of a plausible argument to sustain it."

The case last cited was approved and followed, upon the point under consideration, in *Fleece* v. *O'Rear*, 83 Ind. 200, where it was said: "The fact that the appellant was only the equitable owner of the land, did not deprive him of the right to enforce a vendor's lien for the purchase-money."

In *Carey* v. *Boyle*, 53 Wis. 574, it was held by the Supreme Court of Wisconsin that where A. purchased land for the benefit of B., and paid the purchase-money, and had the deed made to B., in the view of equity A. and B. stood in the relation of vendor and purchaser of the land, and the former had a vendor's lien for the amount of the unpaid notes; and further, that even if A. was to be regarded as a stranger to the title, who merely advanced money to B. for the sole purpose (as understood by both) of enabling the latter to purchase the land, he, A., was entitled to be subrogated to the rights of the vendor. See, also, *Jones* v. *Parker*, 51 Wis. 218; *Carey* v. *Boyle*, 56 Wis. 145.

Before closing this opinion we may properly remark that, although this cause was apparently submitted to a jury for trial as an ordinary civil action, yet the record shows that afterwards, by the agreement of the parties, the cause was submitted to the court, as a suit in equity, upon the complaint, answer and evidence heard, and upon the general verdict and special findings of the jury. for final hearing, judgment and decree. We find no error in the record. The judgment is affirmed with costs.

ZOLLARS, J., was absent when this cause was considered and decided.

Filed April 26, 1884.

No. 10,394.

THE WESTERN UNION TELEGRAPH COMPANY *v.* JONES.

TELEGRAPH COMPANY.—*Failure to Transmit Message.—Contract.—Penalty.*—While a telegraph company can not, by contract, avoid the liability for the penalty imposed by R. S. 1881, section 4176, it may contract that a claim for that penalty shall be made to it within a reasonable time, and in the absence of special circumstances, sixty days is not unreasonable.

From the Superior Court of Tippecanoe County.

J. A. Stein and *G. W. Collins*, for appellant.

R. P. Davidson, C. D. Jones and *A. K. Aholtz*, for appellee.

ELLIOTT, J.—A telegraph company engaged in transmitting messages for the public can not by contract evade the penalty prescribed by statute for a breach of a duty imposed by law. *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; S. C., 9 Am. Rep. 744; *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53; *Western Union Tel. Co.* v. *Adams*, 87 Ind. 598; S. C., 44 Am. Rep. 776.

It is the general rule that telegraph companies, common carriers and others engaged in pursuits of a like character, affecting the interests of the community at large, can not by contract absolve themselves from the duty to use reasonable care and diligence, but this principle does not go to the extent of denying them a right to make reasonable rules and regulations, nor does it preclude them from incorporating in their contracts with those with whom they deal, just and reasonable provisions limiting their liability. How far the right to limit the liability extends is not very distinctly defined, and there is much diversity of opinion upon the question; but that there is a right to make some limitations is very generally declared by the adjudged cases. *Adams Ex. Co.* v. *Fendrick*, 38 Ind. 150.

Individuals have a right to limit by contract the time within which actions shall be brought in case of a breach, and if the limitation is a reasonable one, it will be enforced although it

may be different from that prescribed by statute. Wood Lim. 80. This principle was applied to telegraph companies in *Wolf* v. *Western Union Tel. Co.*, 62 Pa. St. 83 (1 Am. R. 387), and it was said: "But clearly it is not unreasonable that a telegraph company should require notice of claims for its defaults within a reasonable time before being held to answer for the alleged default. From the very nature of its business, this may be essential to its protection against unfounded claims." A like ruling was made in *Young* v. *Western Union Tel. Co.*, 65 N. Y. 163. The question as to the right of common carriers to limit by contract the time within which claims for damages must be presented is elaborately discussed in *Express Co.* v. *Caldwell*, 21 Wall. 264, and it was held that they might exercise the right, the court saying: "Our conclusion, then, founded upon the analogous decisions of courts, as well as upon sound reason, is that the express agreement between the parties averred in the plea was a reasonable one, and hence that it was not against the policy of the law. It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days." A limitation to thirty days was held valid in *Southern Ex. Co.* v. *Caperton*, 44 Ala. 101. The case of *Lewis* v. *Great Western R. W. Co.*, 5 H. & N. 867, is regarded as a leading case upon this subject, and has been uniformly approved by our American cases, in so far at least as concerns the general principle involved. In that case it was held that a limitation of seven days was neither against public policy nor against law, and that it was not unreasonable. *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525; *Breese* v. *United States Tel. Co.*, Tel. Cases, 663. In *Adams, etc., Co.* v. *Reagan*, 29

Ind. 21, the case was referred to and treated as expressing the law correctly, but it was held that under the facts of the particular case the stipulation was an unreasonable one. The English case cited is approved by the Supreme Court of Wisconsin, in *Heiman* v. *Western Union Tel. Co.*, 16 Reporter, 349, and it was held that a contract similar to that here under discussion was reasonable and valid. It is proper to observe that here the limitation is sixty days, while in the case referred to it was twenty days.

On principle and authority, it must be held that a telegraph company may, by contract, require claims based upon a failure to perform its duty to be brought to its notice within a reasonable time. In adopting this rule we do not run counter to our former decisions. What we here decide is, that a telegraph company may limit, by contract, the time within which claims based upon its default shall be brought to its notice, provided always that the limitation is a reasonable one. What we have heretofore decided, and again affirm, is, that a telegraph company can not contract for absolution from negligence. In *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429, the authority of telegraph companies to make reasonable regulations is recognized, for it is said: "We think the question upon which the case depends is whether or not this was such a regulation as the company might lawfully make under the statute in question;" and the cases of *MacAndrew* v. *Electric Tel. Co.*, 17 C. B. 3; *Camp* v. *Western Union Tel. Co.*, 1 Met. (Ky.). 164, *Ellis* v. *American Tel. Co.*, 13 Allen, 226, and *Western Union Tel. Co.* v. *Carew*, *supra*, in which the general doctrine is distinctly affirmed, were cited, and the doctrine of these cases was not denied by the court, as appears from what is said on page 441 of the opinion.

The right of the sender of a message to the statutory penalty has for its foundation a contract, for without a contract no duty is owing him, and, if no duty, then no default. *Carnahan* v. *Western Union Tel. Co.*, 89 Ind. 526; *Rogers* v. *Western Union Tel. Co.*, 78 Ind. 169; S. C., 41 Am. R. 558.

The statute does not undertake to provide what contracts shall or shall not be made; the parties are left free to contract, restrained only by the general rules of law. It is not to the statute, then, that we are to turn for the rules which determine the right to contract and the effect of the stipulations embodied in the agreement, but to the general principles of law declared and illustrated by the adjudged cases.

The statute of New York contains a provision requiring telegraph companies to transmit messages with impartiality and good faith under penalty of $100 for every neglect or refusal so to do; and in *Breese* v. *United States Tel. Co.*, 48 N. Y. 132, it was urged upon the court that this provision precluded the company from contracting with the sender of a message limiting its general liability, but the court denied the correctness of this position. It was said in the course of the opinion, that "There is no limitation or restriction on their power to make such prudential rules, regulations and by-laws as they may deem necessary in the transaction of their business, except only that they shall not be inconsistent with the laws of this State or of the United States." If the authority to make by-laws for the regulation of business is not denied by the provisions of the statute, certainly that of making contracts, where mutual agreement is essential, can not be. The statute of Massachusetts requires telegraph companies to transmit messages faithfully and impartially, but the court held, in *Ellis* v. *American Tel. Co.*, *supra*, that this provision did not abridge the right of the company to make regulations not inconsistent with the general rules of law. It is true that the cases we have cited carry the doctrine of the right to contract for relief from liability further than our cases, and in this respect we can not approve them, but this, instead of weakening their force upon the point to which they are here cited, makes it all the more vigorous.

Our conclusion that the provision written in the contract between the parties, limiting the time within which claims shall be presented, is valid, does not lead to an affirmance of

the right of the telegraph company to neglect the duties imposed upon it, nor does it lead to an affirmance of a right to contract for relief against responsibility for negligence, nor does it put it in the power of the company to nullify or evade the law. All that logically results from our conclusion is that the parties may make a contract imposing a reasonable limit upon the right to present claims based upon its default, but this does not authorize the inference that a contract contravening the law or evading the statute may be valid, nor does it authorize the inference that a limitation may be made which will operate to impair the force of the statute by making an unreasonably short limit.

The penalty provided by the statute is given to one who contracts with a telegraph company for the transmission of a message, and it is not a penalty recoverable by public prosecution, but is one for which a civil action will lie. Nor is the civil action for the benefit of the public, for the formal right of action and the entire beneficial interest are exclusively in the individual who contracts with the company in the particular instance. The case is, therefore, entirely unlike public prosecutions for offences affecting the community at large, which are conducted by public officers and in which individuals have no private interest. Penalties given exclusively to private individuals may be compounded, while penalties prescribed for purely public offences can not be, even though part of the penalty be given to the informer. Buller's Nisi Prius, 196; *Anonymous*, Lofft, 155.

We think it clear on general principles that a telegraph company is not precluded from making a reasonable contract simply because a statute provides a penalty for a negligent performance of a duty or wilful misbehavior. We think, too, that the statute upon which the appellee's cause of action rests confers authority to make reasonable contracts, not contravening the general rules of law nor violating the provisions of the statute. This conclusion may be supported

on two grounds: *First.* Where a corporation is erected by statute, and there are no restrictive provisions, it possesses, as an incident of corporate existence, authority to make reasonable regulations for the transaction of corporate business. *Second.* The language of the statute is that the company shall receive despatches whether from individuals or other telegraphic lines, and, on payment or tender of the usual charge, "according to the regulations of such company," it shall transmit despatches with impartiality and good faith, and this provision clearly implies authority to make reasonable regulations. Under this provision, read by the light of the ordinary rules of law, it is just to conclude that requiring a contract limiting the right to present claims to a reasonable time is a proper exercise of corporate authority.

Our conclusion is that the stipulation written in the contract of the parties, requiring all claims to be presented within sixty days, is, on its face, a reasonable and valid one.

It is a general rule that limitations imposed by contract may be waived. Wood Lim. 80, 81. Within this general rule cases like this fall, and a waiver may, no doubt, be shown, but a waiver can not be presumed; facts constituting it must be pleaded. So, too, circumstances may excuse the party from presenting the claim within the time prescribed; but the facts constituting the excuse must be made to affirmatively appear. And so, too, facts may be shown which, in the particular case, as held in *Adams, etc., Co.* v. *Reagan, supra,* would constitute the limitation an unreasonable one; but, until such facts are shown, a limitation, reasonable on its face, must be sustained as a valid and enforceable stipulation of the contract of the parties.

A limitation by contract does not operate until a party has had notice of his rights, or by the exercise of ordinary diligence might have had notice, and, therefore, the right of a sender of a message would not accrue until he had notice of the default of the company, or by the exercise of ordinary dil-

igence could have had notice. But where an answer states facts constituting a *prima facie* defence, facts avoiding it must be affirmatively pleaded.

In the present case the question comes to us upon a demurrer to the answer setting forth the contract containing the stipulation referred to, and on the ruling on the demurrer our decision must be given.

Judgment reversed, with instructions to overrule the demurrer to the second paragraph of the answer, and to proceed in accordance with this opinion.

Filed Jan. 23, 1884.

On Petition for a Rehearing.

Elliott, J.—It is argued that the limitation in the contract extends only to actions for damages, and not to actions for penalties; but we think this is giving a more restricted meaning to the clause in the contract than it should receive.

The context of the agreement shows that it was intended that all claims for breach of contract or of duty should be presented within sixty days. The word "claims" is one of very broad meaning, and embraces every species of legal demands. *Vedder* v. *Vedder*, 1 Denio, 257; Coke Litt. 291, *b*.

We have often decided that a contract is essential to the right to demand the penalty, and if the parties have a right to contract, then it must follow that they may make reasonable stipulations, provided that they do not operate to defeat, restrict or impair the operation of the statute. It is true that the contract can not, in any way, limit or control the operation of the statute, but it may prescribe a reasonable time within which such claims shall be presented, for this does not contravene the provisions of the law, as declared by any statute or decision. In *Western Union Tel. Co.* v. *Adams*, 87 Ind. 598, Zollars, J., thus stated and answered the question involved in that case: "Has the company power to make and enforce the contract, and thus defeat the object of the stat-

ute? This question has been answered in the negative in former decisions of this court." The difference between the case cited and the one at bar is very obvious. Here there is no attempt to limit or impair the operation of the statute; nothing is taken from the duty imposed on the telegraph company, nor is that duty lessened or circumscribed in any particular. The duty is left undiminished, but a limitation is fixed within which a claim for loss or injury resulting from a breach shall be made. It is one thing to limit a duty, and quite another thing to prescribe a time for making a claim based on the non-performance of that duty. The cases cited in the original opinion fully sustain the power of the telegraph company to make reasonable rules and regulations, and a rule embodied in the contract that the claim shall be presented within sixty days is unquestionably a reasonable one.

It is clear from the whole contract that the purpose of the clause requiring claims to be presented within sixty days was to secure the presentation of all claims, and not merely claims of a particular class. We think that in order to carry into effect the evident intention of the parties, and to give the clause the meaning which the context shows it should have, it must be held that all claims, which will confer a right to a recovery in money for a breach of contract or of duty, must be presented within sixty days. In a broad sense, the word "damages" means that which is assessed in the plaintiff's favor as the amount of his recovery, and the statutory penalty is in this sense "damages." In the precedents of declarations for penalties given by statute, the conclusion is to the damage of the plaintiff, and the form of the judgment is that the plaintiff recover the damages assessed. Oliver Prec. 690, 691.

Petition overruled.

Filed May 7, 1884.

No. 10,773.

THE PENNSYLVANIA COMPANY ET AL. *v.* RUSIE.

PLEADING.—*Justice of the Peace.—Complaint against Railroad Company for Killing Stock.*—A complaint before a justice of the peace against a railroad company, averring that, on, etc., at, etc., the defendant's servants wilfully and negligently, and without any fault of the plaintiff, ran its cars upon plaintiff's mare, whereby, etc., is sufficient after verdict.

SAME.—*Appeal.—Practice.*—Where on appeal from a justice of the peace, the complaint is amended in the circuit court, its sufficiency is to be determined by the rules of pleading before justices of the peace.

INSTRUCTIONS.—An instruction will be reviewed in connection with others given, and, thus considered, if the law be correctly stated, there is no error.

From the Morgan Circuit Court.

S. O. Pickens, for appellants.

G. A. Adams and *J. S. Newby*, for appellee.

ZOLLARS, J.—With the averment that appellants are a corporation, there are the further averments in the complaint: "That on the twelfth day of September, 1881, the defendant's servants, wilfully and negligently, and without any fault of the plaintiff, ran the defendant's train of cars against and upon plaintiff's mare, in Morgan county, Indiana, whereby she received injuries, from the effects of which she died, to the damage of the plaintiff," etc.

Counsel for appellant assails the complaint, and argues that it does not charge a wrong upon the railroad company, but upon its servants, without any averment that they were in the line of their employment in operating the train. As here presented, the objections are not tenable. The action was commenced before a justice of the peace. On appeal to the circuit court, the complaint was amended by adding the averment that appellee was without fault. Notwithstanding this amendment, the complaint must be tested by the rules of pleading applied in justice courts.

No demurrer was filed to the complaint in either court. Its

sufficiency was called in question by a motion to arrest the judgment. As against this motion, under the liberal rules of pleading and practice in justices' courts, we think the complaint sufficient. Without elaboration, we cite the following cases, illustrative of these rules, and the rule to be applied, where the sufficiency of the complaint is called in question for the first time by a motion to arrest the judgment. *Smith* v. *District Trustees, etc.*, 5 Blackf. 40; *Milholland* v. *Pence*, 11 Ind. 203; *Clark* v. *Benefiel*, 18 Ind. 405; *Ohio, etc., R. W. Co.* v. *Miller*, 46 Ind. 215; *Crocker* v. *Hoffman*, 48 Ind. 207; *Powell* v. *DeHart*, 55 Ind. 94; *United States Ex. Co.* v. *Keefer*, 59 Ind. 263; *Smith* v. *Stanford*, 62 Ind. 392; *Indianapolis, etc., R. R. Co.* v. *Sims*, 92 Ind. 496; *Beard* v. *First Presbyterian Church, etc.*, 10 Ind. 568; *Indianapolis, etc., R. R. Co.* v. *Petty*, 30 Ind. 261; *Alford* v. *Baker*, 53 Ind. 279; *Eigenmann* v. *Backof*, 56 Ind. 594; *Hewett* v. *Jenkins*, 60 Ind. 110; *Sherrod* v. *Shirley*, 57 Ind. 13; *Donellan* v. *Hardy*, 57 Ind. 393; *Louisville, etc., R. W. Co.* v. *Spain*, 61 Ind. 460; *Scott* v. *Zartman*, 61 Ind. 328; *Hostetler* v. *State, ex rel.*, 62 Ind. 183; *Toledo, etc., R. W. Co.* v. *Stevens*, 63 Ind. 337; *McMakin* v. *Weston*, 64 Ind. 270; *Dowling* v. *Crapo*, 65 Ind. 209; *DePriest* v. *State, ex rel.*, 68 Ind. 569; *Evansville, etc., R. R. Co.* v. *Willis*, 80 Ind. 225; *Beineke* v. *Wurgler*, 77 Ind. 468; *Koons* v. *Carney*, 87 Ind. 34; *Clegg* v. *Waterbury*, 88 Ind. 21; *Louisville, etc., R. W. Co.* v. *Harrington*, 92 Ind. 457.

Complaint is also made of the first and seventh instructions given by the court. The first simply states the contents of the complaint, substantially in its language, and the denial thereof. The seventh states briefly the claim made by the plaintiff in his complaint, and that if the horse was wilfully killed, contributory negligence is not a defence.

The objection urged against these instructions is, that they proceed upon the theory of the complaint, and that the jury might have understood from them that the plaintiff was entitled to recover, whether the acts of the servants were within the line of their employment or not. These instructions

should be considered in connection with the others given by the court upon the same subject. In the fourth, the jury was told in emphatic language that in order for the plaintiff to recover, he must establish, by a preponderance of the evidence, that the defendants wilfully or negligently injured plaintiff's horse, without fault on his part. Other instructions put the case to the jury as between the appellee and appellants, as the parties to the action, and upon the theory that appellee was not entitled to recover unless the appellants were in fault in the injury to the animal. It is very patent from the several instructions, that the case was tried upon the theory, that the complaint charged the wrong upon the appellants through their servants, and not upon the servants independent of their principals. The evidence is not in the record. In its absence, we must presume that it made out a case against appellants upon the theory of the instructions.

As we find no available error in the record, the judgment is affirmed with costs.

Filed Jan. 29, 1884. Petition for a rehearing overruled May 7, 1884.

No. 9951.

The Union Mutual Life Insurance Company *v.* Abbott et al.

Supreme Court.—*Finding.—Sufficiency of Evidence.*—Where the evidence tends to sustain the finding of the trial court on the only point in controversy, it will not be disturbed by the Supreme Court.

From the Superior Court of Marion County.

S. Claypool and *W. A. Ketcham*, for appellant.

G. W. Spahr, for appellees.

Howk, C. J.—On the 12th day of December, 1873, the appellee David B. Abbott, as sole plaintiff, commenced this

suit, in the Pulaski Circuit Court, against the appellant, the Union Mutual Life Insurance Company, of Maine, and Lewis L. Kelley and Samantha Kelley, as defendants. The object of the suit was to foreclose a certain mortgage, executed by Kelley and Kelley to David B. Abbott, on certain described real estate in Pulaski county, and to have his mortgage declared, by the judgment and decree of the court, a lien upon the mortgaged premises prior in equity to the lien of another mortgage also executed by Kelley and Kelley, on the same premises, to the appellant, the Union Mutual Life Insurance Company, of Maine. The cause was put at issue and submitted to a jury for trial, but failing to agree upon a verdict, they were discharged. The venue of the cause, on the defendants' motion, was then changed to the Carroll Circuit Court. In this latter court, the appellant, the life insurance company, with leave of the court, filed a substituted answer in general denial of appellee's complaint, and also a cross complaint for the foreclosure of its own mortgage. Thereupon, by the written agreement of the parties, the court ordered the cause to be transferred and certified to the Marion Superior Court, for issue and trial, which was done accordingly. In this latter court, the cause was put at issue and tried by the court, and a finding was made for the appellee David B. Abbott. Over the appellant's motion for a new trial, the court adjudged and decreed that the lien of the mortgage to David B. Abbott, on the mortgaged real estate was "paramount, prior and senior" to the lien of the mortgage to the appellant, the life insurance company, on the same real estate; and that, in favor of David B. Abbott, the equity of redemption of the life insurance company, in and to such real estate, should be forever barred and foreclosed. On appeal to the general term, the judgment and decree of the special term were affirmed.

Error is assigned by the appellant, the life insurance company, in this court, which brings before us the error assigned by it, in general term, namely, that the court, at special

term, erred in overruling its motion for a new trial. In this motion, the only causes assigned for such new trial were that the finding of the court was contrary to law, and was not sustained by sufficient evidence.

The only controversy in the trial court, and the only controversy in this court, is in relation to the priority of the respective mortgages executed by the Kelleys to the appellee David B. Abbott, and to the appellant, the Union Mutual Life Insurance Company, of Maine. The question for decision, therefore, is one of fact and not of law. The facts, briefly stated, are as follows: In May, 1873, the defendant, Lewis L. Kelley, desired to purchase of John Purdue the real estate, in Pulaski county, described in each of the mortgages. Purdue was willing to sell for $5,000, but he required the purchase-money to be paid in cash, and Kelley had no money. Thereupon Kelley applied to the appellant's financial agent, in this State, for a loan of $6,500, to be secured by a mortgage on the real estate. In the mean time, it was necessary that Kelley should procure a deed of the real estate from Purdue, to enable him to show the appellant that he held the legal title to such real estate. But Purdue would not convey the real estate to Kelley without the payment in cash of the $5,000. To enable Kelley to close the purchase of the real estate and procure the conveyance thereof from Purdue, the appellant's financial agent, on his personal credit, borrowed the needed sum of $5,000, on short time, for Mr. Kelley, wherewith he procured from Purdue the conveyance of such real estate.

Kelley then made a formal written application to the appellant, through its financial agency at Indianapolis, for the loan of $6,500, and this application was forwarded to the appellant at its home office, in the State of Maine. This application was made to the appellant's agent at Indianapolis, on the 31st day of May, 1873, and, on the same day, Kelley also applied to the appellant's life insurance agent at Indianapolis for a policy of insurance on his life. On the same

day, Kelley signed and acknowledged the mortgage to the appellant, but the date was left blank. On the trial, Kelley testified: "The date of the mortgage was to be put in, when I received the balance ($1,500) of the money. I don't think I signed the bond until the morning of June 14th, 1873. I am not positive, but I don't think I signed the bond and coupons until that time." On June 14th, 1873, the appellant notified its financial agent at Indianapolis, that it accepted Kelley's application for a loan of $6,500; and upon his draft on the appellant, on that day, its agent procured the money and applied the same as Kelley had directed, and his mortgage, bond and coupons were dated on that day.

Upon the foregoing facts, we are of opinion that the trial court was authorized and justified in finding, as it manifestly did, that the negotiations between Kelley and the appellant for the loan of $6,500 were not fully consummated, and that Kelley's mortgage, bond and coupons, given to the appellant, were not fully executed by Kelley until the 14th day of June, 1873, the day of their respective dates.

In the mean time Kelley wanted more money than he could possibly realize from his application to the appellant. Accordingly, on the 4th or 5th day of June, 1873, Kelley made application to the appellee David B. Abbott, for a loan of $5,000, and represented that he owned the real estate, and his title to the same was clear. Finding upon examination that Kelley did own the real estate, and that his title thereto was clear, the appellee David B. Abbott, on the 7th day of June, 1873, loaned the sum of $5,000 to Lewis L. Kelley, and he and his wife, Samantha, on the same day, to secure his note for the sum so loaned, executed a mortgage on such real estate to the appellee David B. Abbott. Each of these mortgages was duly recorded in the recorder's office of Pulaski county, within the time prescribed by law.

On the 22d day of October, 1873, the appellant, having learned before that day of the existence of the mortgage to

David B. Abbott, and that it bore a date prior to the date of the appellant's mortgage, commenced a suit in the Pulaski Circuit Court against Lewis L. and Samantha Kelley, for the purpose, as alleged, of reforming its mortgage by changing the date thereof to the 31st day of May, 1873. David B. Abbott was not made a party to such suit, and, of course, was not bound by any of the proceedings therein. On the trial of the case at bar, Kelley testified that he never authorized any one to appear for him and answer in such suit. It is not very material whether Kelley did or did not authorize any one to appear and answer for him in such suit; because, as Abbott was not a party to the suit, the appellant's counsel concede that he, Abbott, is not bound or concluded by the attempted correction of the date of appellant's mortgage.

The foregoing facts are substantially those which the evidence in the record strongly tends to establish. Upon these facts, it seems to us that the equities of this case are with the appellee David B. Abbott, as against the appellant, the life insurance company. But, in any event, the evidence appearing in the transcript tends, clearly and forcibly, to sustain the finding of the trial court. In such a case, it is settled by a long line of decisions, that the finding or verdict below will not be disturbed by this court on what might seem to be the preponderance of the evidence. *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73; *Hayden* v. *Cretcher*, 75 Ind. 108; *Cornelius* v. *Coughlin*, 86 Ind. 461; *McCloskey* v. *Indianapolis, etc., Union*, 87 Ind. 20.

The motion for a new trial was correctly overruled.

The judgment is affirmed with costs.

NOTE.—The death of the appellee David B. Abbott, since the submission of this cause, having been suggested, the judgment of this court is rendered herein as of the November term, 1882.

Filed Dec. 11, 1883. Petition for a rehearing overruled May 7, 1884.

96 [illegible]
199 [illegible]

No. 11,366.

Bott et al. v. Barr, Administrator.

Decedents' Estates.—*Contract of Administrator.—Claim.—Pleading.—Statute of Frauds.*—Complaint in two paragraphs, in the ordinary form, against an administrator: 1. Alleging a contract with the defendant to saw for him certain logs of the decedent into lumber at a certain price; that the work was done, and the defendant failed to pay on request. 2. Alleging a promise of the defendant to pay a certain sum for sawing lumber for the decedent in his lifetime, which lumber remained in the plaintiff's possession, and on which he held a lien for the sawing; that the lumber was delivered to the defendant on his promise to pay for the sawing, and that on request he failed to pay.

Held, that both paragraphs were good on demurrer.

From the Lawrence Circuit Court.

W. H. Martin, for appellants.

M. F. Dunn and *G. G. Dunn*, for appellee.

Bicknell, C. C.—The appellants were the plaintiffs below. Their complaint was in two paragraphs. Demurrers were sustained thereto for want of facts sufficient. Judgment was rendered upon the demurrers, and the plaintiffs appealed. The rulings upon the demurrers are the only errors assigned.

The first paragraph alleged that the defendant was administrator, and that at the time of his intestate's death there were saw-logs of his in the plaintiff's log-yard, and that afterwards the defendant agreed with the plaintiffs to pay them forty cents per hundred feet for sawing said logs into lumber, and that under that contract they sawed for defendant 14,254 feet, and thereby became entitled to $72.16; that said sum is due and unpaid, and that defendant, although often requested, has failed to pay any part of it. Wherefore, etc.

The cause of action here stated is not within the statute, R. S. 1881, section 2310, because it is not "for the recovery of any claim against the decedent," and it is not within the first clause of section 4904, R. S. 1881, because the agreement stated is the original agreement of the defendant upon a suffi-

cient consideration. "The contracts of an executor or administrator can not be regarded as in any sense the contracts of the decedent. They are necessarily the personal contracts of the executor or administrator, and he must be held personally liable therefor, when he does not stipulate for exemption from such liability" Per HOWK, J., in *Long* v. *Rodman*, 58 Ind. 58, citing 3 Williams Ex'rs, 6th Am. ed., p. 1861, note k.

The first paragraph was sufficient. The second paragraph states that the plaintiffs, under a contract made with the intestate in his lifetime, had sawed for him 115,469 feet of lumber at forty cents per one hundred feet, for which their bill amounted to $461.60; and that since said intestate died, leaving said lumber in plaintiff's hands unpaid for, and defendant became his administrator; that defendant demanded of plaintiffs said lumber as part of the assets of said intestate's estate, but plaintiffs refused to give it up until their lien for said $416.60 should be paid; that thereupon said defendant promised the plaintiffs that if they would permit him to sell said lumber, he would, out of said sale, pay and discharge said lien in full; that, relying on said promise, the plaintiffs did permit the defendant to sell said lumber, yet he, although often requested, has failed and refused to pay said lien or any part thereof. Wherefore, etc.

Here, also, the contract stated is the special contract of the defendant, made upon a sufficient consideration. Such a promise is not within the statute of frauds. *Luark* v. *Malone*, 34 Ind. 444. And see *Carter* v. *Thomas*, 3 Ind. 213; *Cornthwaite* v. *First Nat'l Bank*, 57 Ind. 268; *Hackleman* v. *Miller*, 4 Blkf. 322; *Morrison* v. *Kramer*, 58 Ind. 38; *Shaffer* v. *Ryan*, 84 Ind. 140; *Holderbaugh* v. *Turpin*, 75 Ind. 84. The second paragraph was sufficient. The court erred in sustaining the demurrers. The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the ap-

pellee, and this cause is remanded, with instructions to the court below to overrule the demurrers to the first and second paragraphs of the complaint.

Filed May 8, 1884.

95 248
124 309
95 245
135 544

No. 11,334.

Rutherford *v.* Davis.

Highways.—*Opening of, by Supervisor.—Suit for Trespass.—Answer in Justification.*—One sued as a trespasser may justify the acts complained of as being done by him as a road supervisor while opening a highway, duly located, on a sufficient petition and notice, by the proper board of commissioners. But, where he thus justifies, he must not only allege such order of location, but also facts showing that his acts under such order were lawful, or he will be held a trespasser *ab initio*.

Same.—*Notice to Land-Owners by Supervisor.*—Under the act of 1852, creating the office of road supervisor, and under that of 1881, creating the office of township superintendent, and also under the act of 1883, abolishing the latter and reviving the former, such officer must, before opening a highway, give to owners of lands affected the sixty days' notice required by section 5030, R. S. 1881.

From the Washington Circuit Court.

J. A. Zaring, for appellant.

S. B. Voyles, *H. Morris* and *A. B. Collins*, for appellee.

Elliott, J.—The answer of the appellee alleges that he was the duly elected, qualified and acting supervisor of roads; that before the occurrence of the alleged trespass complained of by the appellant, a petition for the location of a highway was filed by twelve freeholders, six of whom were residents of the immediate vicinity of the highway then proposed to be located; that the petition was duly acted upon by the board, and such proceedings had as resulted in the following order: "And the board find that the said petition and notice are in proper form and sufficient, and that twelve of the petitioners are freeholders, and that six of them reside in the immediate vicinity of the route of the proposed highway, and

that due notice of the time of the presentation of said petition, as required by law, had been given." The answer also alleges that after the report of the viewers had been made as ordered, an order was made establishing the highway, and directing that it be opened and kept in repair; that the auditor of the county issued and delivered to the township trustee a certified copy of the judgment of the board of commissioners; that the latter issued and delivered to the appellee, as supervisor, an order commanding him to open the highway as directed; that, acting under and pursuant to this order, and in his official capacity of supervisor, he proceeded to open the way, not through an enclosure of a year's standing, and that all of the acts complained of were done by him in his official capacity, and by virtue of the authority conferred upon him by the judgment of the board of commissioners.

The statute invests the board of commissioners with general jurisdiction of the matter of laying out and opening highways, and the board in this instance had jurisdiction of the subject-matter of the petition. The petition is shown to be such as invoked the exercise of their jurisdiction in this particular instance, and there was notice. The judgment of the board was, therefore, rendered in a case where it had jurisdiction, and the rule is firmly established that where the tribunal has jurisdiction collateral attacks are fruitless. *Cauldwell* v. *Curry*, 93 Ind. 363; *Coolman* v. *Fleming*, 82 Ind. 117; *Stoddard* v. *Johnson*, 75 Ind. 20; *Featherston* v. *Small*, 77 Ind. 143; *Simonton* v. *Hays*, 88 Ind. 70; *Town of Cicero* v. *Williamson*, 91 Ind. 541; *Muncey* v. *Joest*, 74 Ind. 409; *Reynolds* v. *Faris*, 80 Ind. 14; *Schmidt* v. *Wright*, 88 Ind. 56. The answer, of which we have given a synopsis, shows a case in which the board of commissioners had jurisdiction, and the judgment can not be collaterally impeached.

It is a familiar rule that a ministerial officer charged with the duty of executing process is protected by that process, if it was issued by a court of competent jurisdiction, and is regular on its face. The order issued to the supervisor was, as

the answer shows, issued by a court having jurisdiction of the subject-matter, and was regular on its face, and the officer was, therefore, not bound to look behind it. *Ewing* v. *Robeson*, 15 Ind. 26; *Hazzard* v. *Heacock*, 39 Ind. 172; *Noland* v. *Busby*, 28 Ind. 154; *Davis* v. *Bush*, 4 Blackf. 330; *Caldwell* v. *Kenworthy*, 31 Ind. 238; *Hill* v. *Haynes*, 54 N. Y. 153; *Chegaray* v. *Jenkins*, 5 N. Y. 376.

The answer shows an order which would have protected the supervisor, if, in executing it, he had obeyed the law. It is not enough, however, to show an order or judgment in justification, for it must also be shown that the officer proceeded in the manner provided by law. In proceedings subsequent to the delivery of the process to him, the officer must act in obedience to law, or he becomes a trespasser *ab initio*. *Jarratt* v. *Gwathmey*, 5 Blackf. 237.

The question which remains is, whether the appellee did proceed in accordance with the law in executing the process issued to him. The statute enacted in 1852 provides that the supervisor shall give sixty days' notice in writing to remove fences. R. S. 1881, section 5030. Under this statute it was held, and rightly, that a supervisor, who undertakes to justify under an order of the board of commissioners, must aver that he gave the proper notice. *Ruston* v. *Grimwood*, 30 Ind. 364; *Suits* v. *Murdock*, 63 Ind. 73. In the revision of 1881, the title of the officer is "township superintendent," while in the original act it is "supervisor," but we need not stop to inquire whether the change in the statute made by the revisers is or is not an authorized and effective one, for it is clear that the statute was intended to secure notice in all cases, and that it is, therefore, incumbent upon the ministerial officer, whatever his title may be, to give the notice required before destroying fences. The act, abolishing the office of supervisors, in force when the revision of 1881 was made, was repealed by the act of March 2d, 1883, the office of supervisor created, and that of road superintendent abolished. Acts 1883, p. 62. We have found no statute changing the

provisions of section 5030, respecting notice, and it must be deemed to be in full force and binding upon supervisors acting under orders directing the opening of highways.

The answer in this case is bad for the reason that it does not show that the notice required by law was given. Judgment reversed.

Filed May 6, 1884.

95 248
123 364

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158 645

No. 11,078.

BROWN, ADMINISTRATOR, *v.* FORST.

DECEDENTS' ESTATES.—*Creditors Paid by Widow.—Subrogation.*—A widow has such an interest in the settlement of her deceased husband's estate as will, where it is beneficial to such estate, subrogate her to the rights of creditors of the estate whose claims she has paid off, or whose claims have been paid by the executor or administrator with money advanced by her for that purpose.

SAME.—*Administrator can not Bind Estate.—Contract.*—Her right to be reimbursed in such case depends solely on the doctrine of subrogation, and not on any contract made by her with the executor or administrator.

SAME.—*Evidence.—Validity of Claim.—Limitations.*—Where she seeks to be subrogated in such case, the evidence must show that claims paid off by her were valid claims against the estate, and that her right to recover is not barred by the statute of limitations.

From the Huntington Circuit Court.

J. B. Kenner and *J. I. Dille*, for appellant.

J. C. Branyan, *M. L. Spencer*, *R. A. Kaufman* and *W. A. Branyan*, for appellee.

HAMMOND, J.—The appellee, who is the widow of the appellant's intestate, on February 8th, 1882, filed against the estate the following claim, verified by affidavit as the statute provides:

"Sarah Forst complains of William Brown, administrator of the estate of Conrad Forst, deceased, and says, that said estate is indebted to her for money had and received by the former administrator, John Stults, to be by him applied in

payment of debts of said estate, and to be accounted for, on final settlement and distribution of said estate, in the following items, to wit:

" Money realized from the real estate of this claimant, sold by said Stults and withheld from the claimant, and applied on the debts of estate	$400	00
Interest on same six years	144	00
Money paid at the bank, First National	100	00
Money paid at the bank, Citizens	45	00
Interest on last two items	52	00
Tax due against estate	75	00
Interest on same six years	27	00
Funeral expenses, A. Q. Kenower	32	00
Interest on the same six years	11	00
Making a total of	$886	00
All of which payments were made at the instance and request of the administrator of said estate. Credit by cash	$145	00
Leaves balance due	$741	00
And said estate is further indebted in the sum of $58 for corn sheller	$ 12	00
On horse	8	00
On clock	5	00
To George Finkenbinder	33	00
Total	$799	00

"For which claimant asks allowance against said estate, and for her costs, and all proper relief in the premises."

Not being allowed, the claim was transferred to the list of those pending for trial. The case was submitted to a jury, who returned a verdict for the appellee. Motions for a new trial and in arrest of judgment were made and overruled; exceptions were taken, and the correctness of these rulings is questioned by the appellant's assignment of errors.

The formality of pleading required in ordinary cases is not

applicable to claims filed against estates. *Stapp* v. *Messeke*, 94 Ind. 423. The statement of the appellee's claim was sufficient as against an objection not made until after verdict. There was no error in overruling the motion in arrest of judgment.

The first and second causes for a new trial were, that the verdict was not sustained by sufficient evidence, and was contrary to law. The evidence tended to prove the following facts. The decedent at his death was seized of one tract of land containing eighty acres, and of another containing forty acres. For the purpose of paying debts, the former administrator, Stults, sold, under an order of court, two-thirds of the forty acres for $800, and induced the widow to convey to the purchaser for $400 her interest in the same tract, and to let him have her part of the money to pay claims against the estate. He promised her that she should be compensated by having added to her one-third in the eighty acres an interest equivalent to that conveyed by her in the forty acres. This was not done, the administrator subsequently selling the two-thirds of the eighty acres. The evidence also tended to prove that the appellee paid various claims alleged to have been held by certain persons against the estate, but never filed against it.

We think that a widow has such an interest in the settlement of her deceased husband's estate as will, where it is beneficial thereto, enable her to be subrogated to the rights of creditors whose claims have been paid by her, or by her money advanced to the executor or administrator for that purpose. *Livingston* v. *Newkirk*, 3 Johns. Ch. 312; *Mitchell* v. *Mitchell*, 27 Tenn. 358; *Williams* v. *Williams*, 22 Am. Dec. 729; Sheldon Subrogation, section 3. Her right to recover against the estate in such case rests in the doctrine of subrogation, and derives no force from any contract with the executor or administrator. Indeed, the law is quite well settled that while an executor or administrator may incur a personal

obligation, he can not, except as to expenses of administration, bind the estate by his contracts with reference to the payment of claims. *Mills* v. *Kuykendall*, 2 Blackf. 47; *Carter* v. *Thomas*, 3 Ind. 213; *Cornthwaite* v. *First Nat'l Bank*, 57 Ind. 268; *Holderbaugh* v. *Turpin*, 75 Ind. 84 (39 Am. R. 124); *Moody* v. *Shaw*, 85 Ind. 88.

As to claims paid by the widow in such case, we think that to authorize a recovery in her favor against the estate it should appear in evidence that the claims paid were valid demands against the estate. And as to money advanced by her to the executor or administrator to pay debts of the estate, it should appear that the money was actually used for that purpose. The evidence failed to show that the claims paid by the appellee were valid demands against the estate, and also failed to show that the administrator used, in paying claims against the estate, the $400, or any part of it, received from the sale of her interest in the forty acres of land.

It may also be suggested that so far as the dates appear in the evidence, the most, if not all, of the appellee's claim was barred by the six years statute of limitations. It was formerly held that an executor or administrator should specially plead the statute of limitations. *Riser* v. *Snoddy*, 7 Ind. 442. But now he may without plea avail the estate of all defences, except set-off or counter-claim. Section 2324, R. S. 1881, and amendment by section 11, Acts 1883, p. 156.

Other causes for a new trial were assigned, and are discussed in appellant's brief, but as they will not likely arise in another trial their consideration is not important.

Judgment reversed at appellee's costs, with instructions to the court below to sustain the appellant's motion for a new trial.

Filed May 8, 1884.

No. 11,238.

KEESAER *v.* BROOKS.

SUPREME COURT:—*Finding.*—*Weight of Evidence.*—Where the evidence is conflicting, the finding of the trial court will not be disturbed by the Supreme Court upon the mere weight of the evidence.

From the Jay Circuit Court.

J. R. Perdieu, I. Simmons, J. W. Headington and *J. J. M. La Follette*, for appellant.

S. W. Haynes, W. E. Cox and *T. Bailey*, for appellee.

HOWK, C. J.—In his complaint in this case the appellant Keesaer, the plaintiff below, alleged that the appellee, on the 1st day of January, 1882, and for a long time thereafter, was possessed of a wild and vicious bull, and it was unsafe and improper to let or permit such bull to be at large, or to go through or along the public highway, of all which the appellee had notice and knew of the vicious habits of such bull; yet, on the 28th day of June, 1882, at Jay county, the appellee being the owner and possessor of such bull, wrongfully, negligently and carelessly permitted the said bull to run at large in the public highway, the said bull being three years old and not permitted to run at large by an order of the board of commissioners of Jay county; that while the appellant was passing on and along the public highway near George Claycomb's, in Jay county, the said bull attacked the appellant's horse, and gored and horned with its horns and wounded and killed the appellant's said horse, without any negligence or fault of the appellant, whereby the appellant was damaged in the sum of $150. Wherefore, etc.

The appellee answered by a general denial of the complaint. The issues joined were tried by the court, and a finding was made for the appellee, the defendant below, and, over a motion for a new trial, judgment was rendered accordingly.

In this court the only error assigned by the appellant is the overruling of his motion for a new trial. The only causes

assigned for such new trial were, that the finding of the court was contrary to law, and was not sustained by sufficient evidence. The burden of the issues in the cause was on the appellant. It was incumbent on the appellant, therefore, to establish by a fair preponderance of the evidence the substantial and material facts alleged in his complaint. These facts were as follows: 1. That appellee's bull was so wild and vicious as to render it unsafe and improper for its owner to permit the bull to be at large, or to go through or along the public highway, of all which the appellee had notice and knew of the vicious habits of such bull; 2. That, with such knowledge, the appellee wrongfully and negligently permitted the bull to run at large in the public highway; and, 3. That without any negligence or fault of the appellant, his horse was gored and killed by the appellee's bull. The evidence is properly in the record, and has been carefully read and considered. It will suffice for us to say that upon all the material questions in the case the evidence is at least conflicting. In such a case, under the long established practice of this court, the finding of the trial court will not be disturbed here on what might seem to be the weight of the evidence. *Cox* v. *State*, 49 Ind. 568; *Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73; *Hayden* v. *Cretcher*, 75 Ind. 108; *Cornelius* v. *Coughlin*, 86 Ind. 461.

From the record of this cause we can not say that the court erred, and, therefore, we are bound to say it did not err, in overruling appellant's motion for a new trial. For the ruling of the trial court is presumed to be correct, and the record fails to show that it was erroneous. *Bowen* v. *Pollard*, 71 Ind. 177; *Dunn* v. *Hubble*, 81 Ind. 489; *Loy* v. *Loy*, 90 Ind. 404.

The judgment is affirmed, with costs.

Filed May 7, 1884.

95 254
196 89

95 254
142 533

95 254
145 526

95 254
157 137

95 254
167 704

No. 10,331.

STANDLEY *v.* NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

PRACTICE.—*Pleading.—Supreme Court.*—Where the plaintiff's reply is tested by demurrer, and the demurrer is overruled, no effort being made by him to carry it back to the answer and no exception taken by him, the Supreme Court will not at his instance hold the answer bad.

LIFE INSURANCE.—*Right to Recover Premiums.*—Where the risk has once attached, premiums can not be recovered, although the company may subsequently wrongfully declare a forfeiture of the policy.

SAME.—*Right of Assured to Specific Performance.—Set-Off.—Foreclosure of Mortgage.*—An agreement to issue a paid-up policy may be specifically enforced, but the right to specific performance can not be made the ground of a counter-claim to a suit by the insurance company to foreclose a mortgage executed to secure a loan of money.

SAME.—*Contract.— Motive.— Consideration.*— The premium paid, or agreed to be paid, for a policy of insurance is the consideration of the contract, and not the motive which induced the assured to take out the policy.

COUNTER-CLAIM.—*Cross Complaint.*—A counter-claim very closely corresponds to the cross bill of the chancery practice, but is more comprehensive, in that it includes recoupment.

SAME.—*What Matters may be Pleaded.*—A counter-claim can only be grounded on matters growing out of or connected with the cause of action, and a matter constituting an entirely distinct cause of action, not connected with the matters stated in the complaint, can not be pleaded as a counter-claim.

SAME.—For a very full discussion of the question, as to what is a counter-claim, see opinion.

DEMURRER TO EVIDENCE.—*Who may Demur.*—The party who has the burden of proof can not demur to the evidence.

From the Cass Circuit Court.

D. C. Justice and *D. Turpie*, for appellant.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and *E. Daniels*, for appellee.

ELLIOTT, J.—The appellee's complaint is based on a note and mortgage executed by the appellant. The answer is in several paragraphs, and, without interposing a demurrer, the appellee replied.

There are several good paragraphs of answer, and conced-

ing, but by no means deciding, that the sufficiency of an answer may be challenged for the first time by the assignment of errors, still the contention of appellee can not prevail, for even in the case of a complaint one good paragraph will repel an assignment of error alleging that the complaint does not state facts sufficient to constitute a cause of action. If there is but one answer, and that is clearly bad, then, perhaps, the court may give judgment on the pleadings, but where there are good paragraphs of an answer this can not be done.

The appellee chose to reply to all of the answers without testing their sufficiency by demurrer, and now argues that it may avail itself of the demurrer to the reply filed by the appellee. The case is entirely unlike that of a defendant who has a bad answer and complains of a ruling holding good a bad reply. Clearly enough his case is well disposed of by informing him that a bad reply is good enough for a bad answer. So, too, the present case is essentially different from that of a plaintiff asking a reversal, where a demurrer has been sustained to a bad reply to a bad answer. In this case the ruling is invoked by a party who secured all he asked and who took no exception, but relies upon an exception taken by his adversary. Our statute is very careful to require that parties who desire to save a question upon a ruling must reserve an exception, and in a very great variety of cases the court has given this statute full and strict effect. There is good reason for the rule. The trial court and the adverse party should be informed that the ruling is to be contested, and the appellate court should be enabled to see from the record what rulings were contested in the trial court. Again, parties ought not to be allowed to shift ground and contest in the Supreme Court points not regularly contested in the lower. The spirit of our statute, and the effectiveness and consistency of our code system of pleading, require that one who secures exactly the ruling he asks, and who takes no exception, should not be allowed to complain on appeal that something more favorable than he asked was not granted

him. It would be a strange perversion of our code practice for the appellate court to compel a trial court to give a plaintiff a new and more favorable ruling than he asked. Such a practice would entail an unjust burden upon the court, break down the provision of our statute requiring parties to except to such rulings as they deem erroneous, and make uncertain all the pleadings in the case. We examined this question with care in *Scheible* v. *Slagle*, 89 Ind. 323, and reached the same conclusion which we now declare. This conclusion is not in conflict with any of our cases.

The cases of *Wiley* v. *Howard*, 15 Ind. 169, and *Reed* v. *Higgins*, 86 Ind. 143, decide that it is error to sustain a demurrer to a reply where the answers are bad. The cases of *Ashley* v. *Foreman*, 85 Ind. 55, *Starkey* v. *Neese*, 30 Ind. 222, *Knippenberg* v. *Morris*, 80 Ind. 540, *Richardson* v. *Seybold*, 76 Ind. 58, *Ætna Ins. Co.* v. *Baker*, 71 Ind. 102, and *Menifee* v. *Clark*, 35 Ind. 304, hold that where the answer is bad there is no error in overruling a demurrer to the reply although it is also bad. It is plain that none of these cases touches the question here, for the appellee is not complaining that a demurrer was sustained, nor the defendant that a demurrer was overruled. The complaint is, that the court did not volunteer to give the plaintiff more than it asked. As the appellee was content with having the reply held good, there ought not to be a shifting of ground in the appellate court, and a demand for something not heard of in the court below. It was only after a long struggle that the court went as far as it did in the cases we have cited, for all our earlier cases held that a demurrer to the reply did not go back to the answer. *Johnson* v. *Stebbins*, 5 Ind. 364; *Mason* v. *Toner*, 6 Ind. 328; *Gimbel* v. *Smidth*, 7 Ind. 627. The rule has been extended as far as it can be without producing great confusion and injustice, and we do not think it should be so far extended as to yield the appellee on appeal what he did not seek in the trial court. The principle which we recognize and apply was declared in *Haymond* v. *Saucer*, 84 Ind. 3, where it was said:

"Counsel for the appellant claim, 'that the sufficiency of the complaint is called in question by the demurrers to the answers'—there having been separate answers addressed to each paragraph severally, to which answers demurrers were filed and overruled. It is plain that those rulings do not reach back to the complaint. If the demurrers had been sustained, and the appellant had assigned error upon the rulings, the respective paragraphs of the complaint would have been brought under consideration, so far, at least, as necessary to determine the sufficiency of the respective answers. So too, if the appellee had, in this case, assigned cross errors upon the overruling of the demurrers to the answers." Where the plaintiff's complaint and reply are left standing, he gets all that he is entitled to have and all that he asks; if he thought himself entitled to something more, he should have asserted his rights at the proper time, and have saved them by an exception as the statute requires. Where a plaintiff defends a ruling on the reply by asserting that the answer to which it was addressed was bad, he occupies a very different position from that occupied when he assails an answer, unchallenged in the court below, for the purpose of securing a ruling in the appellate court not sought in the lower. So, too, does this appellee stand in a very different position from that of a plaintiff warding off an attack on his reply by showing that the answer was bad. Here the attempt is not to protect the reply, for it is not assailed, but the attempt is to secure a new ruling on one paragraph of several, where no question was made or reserved in the trial court. If the appellee were simply defending the reply and seeking to prevent a reversal on the ground of its sufficiency as a reply to a bad answer, we should be confronted by a very different question from that presented by the record.

Leaving now the question of pleading, we come to the question presented by the ruling on the demurrer to the evidence, remarking, however, that it is very doubtful whether the de-

murrer to the evidence did not waive all objections made by the demurrers to the pleadings. *Lindley* v. *Kelley*, 42 Ind. 294. The answers of set-off and recoupment were not proved, because, conceding the evidence sufficient in all other particulars, there was no evidence that any damages resulted from the breach of the contract insisted upon by the appellant. Granting that the appellant proved that he had a contract entitling him to a paid-up policy, and granting, also, that he had performed all his part of the contract, still he proved no damages, because he did not show that the policy would have been of any value. As he gave no evidence of value, the presumption is that the damages were merely nominal, and it is well settled that a failure to award nominal damages will not warrant a reversal.

Premiums paid to secure insurance can not be recovered if the risk has once attached. If a policy is valid in its inception, then the company can not be required to refund the premiums received, although it may subsequently wrongfully attempt to declare a forfeiture. *Continental Life Ins. Co.* v. *Houser*, 89 Ind. 258; Bliss Life Ins. 750; May Ins., sections 567, 568, 569. The appellant could not, therefore, set off or recoup the premiums paid by him, although it should be granted that the company committed a wrong in refusing a paid-up policy and in denying the contract claimed by appellant.

Where an assured is entitled to a policy under his contract with the company, he may maintain a suit in equity to enforce specific performance of the contract. The suit is in all its essential features a suit for specific performance, and may be maintained in cases where the courts would entertain suits of a similar nature. *Hayner* v. *American, etc., Co.*, 69 N. Y. 435; *Cohen* v. *New York, etc., Co.*, 50 N. Y. 610; S. C., 10 Am. R. 522; *Day* v. *Connecticut Life Ins. Co.*, 45 Conn. 480; S. C., 29 Am. R. 693; Pomeroy Spec. Perf., section 16. But in holding, as we do, that a suit for specific performance of a contract to execute a paid-up policy of insurance may be main-

tained, we are not necessarily carried to the conclusion that the right to compel the execution of such a policy may be made available, as a counter-claim, in a suit brought to foreclose a mortgage executed to secure a loan of money.

Assuming that the evidence shows that the appellant had a contract entitling him to a paid-up policy, and that he performed all his part of that contract, and was entitled to have it specifically performed, the question still remains whether the right to demand specific performance of such a contract can be properly asserted in a suit to foreclose a mortgage given to secure a loan.

The evidence shows that the two transactions were legally distinct and different, and that each stood upon its own independent consideration. In the one case the consideration for the note and mortgage was the loan of money; in the other the consideration for the policy was the payment of premiums. There is nothing which, in law or equity, binds the two transactions together, or authorizes the inference that one grows out of the other.

There is an essential difference between the motive which induces a party to enter into a contract and the consideration yielded for its support. "Motive," said an English judge, "is not the same thing with consideration." *Thomas* v. *Thomas*, 2 Q. B. 851. In *Philpot* v. *Gruninger*, 14 Wall. 570, it was said: "It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties." To a like import is the decision in our own case of *Clark* v. *Continental, etc., Co.*, 57 Ind. 135, where it was said: "The motive prompting one to execute a contract, and the consideration of the contract, are entirely different things." The motive which influenced the appellant to take out the policy was the desire to secure the loan, but this was not the consideration on which the contract of insurance rested; on the other hand the desire to secure premiums

on the policy influenced the appellee to make the loan, but this was not the consideration given for the note and mortgage; that consideration was the loan of money.

A counter-claim very closely corresponds to the cross bill of the old chancery practice, but is more comprehensive, for it embraces recoupment. *Woodruff* v. *Garner*, 27 Ind. 4. Our code blends the two systems of procedure, common law and chancery, and there are two elements found in our statutory counter-claim; from the common law is derived the element of recoupment, and the other element is taken from the chancery rule respecting cross bills. A brief consideration of these prime constituents of a counter-claim will assist in securing a just conception of its character and office.

Recoupment signifies reduction, and originally a defendant could only secure a reduction of the amount of recovery by recouping. It has been steadily held that recoupment is only proper in cases where the defendant's claim grows out of the same contract or transaction as that upon which the plaintiff's cause of action is founded. *Davenport* v. *Hubbard*, 46 Vt. 200; 2 Parsons Cont. 742. The essential difference between set-off and recoupment is that in the former case it may consist of a claim arising out of an independent contract; while in recoupment the damages claimed must flow from the same contract as that relied on by plaintiff, or must grow out of the same transaction as that on which the plaintiff's cause of action is founded. 1 Sedgwick Damages, 431; 1 Sutherland Damages, 261; Waterman Set-Off, p. 480, section 464; *Ward* v. *Fellers*, 3 Mich. 281; *Batterman* v. *Pierce*, 3 Hill, 171. The principle which underlies the whole doctrine inflexibly requires that the matter set up by way of recoupment should grow out of the same subject as the cause of action. 1 Sutherland Damages, 265, 270, 272.

A cross bill under the chancery practice, to quote the language of an author long held in high esteem, "can be sustained only on matter growing out of the original bill." 2 Daniel Ch. Pr. 1548 *n*. The same doctrine is sometimes stated

in this form: A cross bill is filed touching matters in question in the original bill. Story Eq. Pl., section 389; Mitford Eq. Pl. 80; *Cross* v. *De Valle*, 1 Wall. 1. This court has given this principle full recognition. *Hunter* v. *McLaughlin*, 43 Ind. 38. It is quite clear, therefore, that the elements combined in our statutory counter-claim unite in the essential particular, that the matter alleged by way of counter-claim must grow out of the subject of the original suit, and this consideration exerts an important influence upon the construction of the statute.

In the construction of statutes it is always proper to consider the law as it stood at the time the statute was adopted and the change intended to be accomplished. We know judicially the purpose our statute was intended to accomplish because that is matter of history. The adoption of the reformed system of code procedure forms an important epoch in the history of the law of this State, and we are fully informed as to the causes which led to its adoption, as well as the purpose it was intended to accomplish. The purpose is, indeed, prominently and plainly indicated in the code itself. A leading purpose was to blend in one system the chancery and common law procedure, but to so blend them that the new procedure, while possessing some of the features of both, should form in itself a complete and harmonious system. In executing this purpose the counter-claim was made to include both recoupment and cross bill, and, perhaps, something more, but it was not intended to overthrow the fundamental principle that the matter made the subject of a counter-claim should grow out of or be connected with, the subject of the original suit. The language of the statute, unaided by extrinsic consideration, indicates with much clearness that the counter-claim must be connected with the subject of the original action, for the provision reads: "A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or

v. *Chappell*, 30 Ind. 72. We do not say that this doctrine is expressed in direct terms, but it is the result of the decisions. It is a just result, and gives fair and beneficent effect to the spirit of the code, and is in accordance with the views of two of the leading authors on code pleading. Pomeroy Rem., section 775; Bliss Code Pl., section 375, p. 376, n. 1.

The term "counter-claim" is used to denote the matters constituting the ground of defence as well as the pleading in which it is stated, and the term "cross complaint" is very frequently used to designate the pleading, although it has been said that "counter-claim" is the proper title of the pleading. Whatever term may be used to designate the pleading, whether "cross complaint" or "counter-claim," it is only proper where it pleads matter connected with the subject of the original action which entitles the defendant to affirmative relief or mitigates the recovery. There are, therefore, two classes of counter-claims. *Campbell* v. *Routt*, 42 Ind. 410; Pomeroy Rem., section 737. The appellant, in this case, is not entitled to a reversal on the ground that he has shown a counter-claim under the second class—that which tends to reduce the recovery—conceding it made out in all other particulars, because, as we have seen, he did not prove any damages. Nor is he entitled to a recovery on a counter-claim of the first class, because the contract which he seeks to have specifically enforced is an independent one, not legally connected with the cause of action. The New York code is broader than ours, for it adds the words "or transaction;" but even under such a provision the facts proved in this case would not constitute a counter-claim according to the decisions of that court. *Edgerton* v. *Page*, 20 N. Y. 281; *Smith* v. *Hall*, 67 N. Y. 48; *People* v. *Dennison*, 84 N. Y. 272. We may say of the appellant's claim what was said of a somewhat similar case by the Court of Appeals of New York: "It is sufficient to say that assuming he has a right of action, it does not arise out of the contract or transaction set forth in the complaint, * * nor is it connected with the subject of the action." *Boreel* v.

Lawton, 90 N. Y. 293. Our conclusion upon this branch of the case is, that where the plaintiff sues to foreclose a mortgage, a counter-claim is not made out by proof of an independent contract entitling the defendant to a paid-up policy of insurance.

We do not find it necessary to decide, and, therefore, do not decide, whether the appellant was or was not entitled to a paid-up policy, for, conceding his claim that he was entitled to such a policy to be just, still he can not, in this case, assert a right to have a policy executed to him, for that is not a proper subject of counter-claim under the case made by the evidence.

The plaintiff's cause of action was admitted, and the burden of proof was, therefore, on the appellant, and the former had a right to demur to the evidence. A party who has the burden can not successfully demur, but where the cause of action is admitted, it is the defendant, not the plaintiff, who has the burden, and a demurrer to the evidence by the latter is entirely proper. *Fritz* v. *Clark*, 80 Ind. 591.

Judgment affirmed.

Filed May 7, 1884.

No. 6711.

The State, ex rel. Clark et al., *v.* Cisney et al.

Sheriff.—*Action on Bond.*—*Failure to Satisfy Execution.*—*Complaint.*—In an action by an execution plaintiff, on a sheriff's bond, for his failure to apply on the execution certain money made by sale of the debtor's property on simultaneous executions, the complaint, after setting out the bond, judgment, execution, levy and sale, alleged that the sheriff had "failed and refused to apply said money or any part thereof, toward the satisfaction of said execution," etc.

Held, on demurrer, that the averment quoted negatives the idea that such money had been paid to the clerk, and is sufficient.

Same.—*Simultaneous Executions.*—*Priority.*—*Judgment.*—*Time.*—Where a number of judgments are rendered by a circuit court against the same defendant, on the same day, are duly signed on the next day, and, upon

præcipes filed in immediate succession, executions are issued in like manner by the clerk, the issuing is but one transaction and no priority exists.

SAME.—*Evidence.—Harmless Error.*—Where, in such action, his returns show that several of the executions came to his hand at one time, and the others at a subsequent time, it is not competent, and it would be no defence, for him to prove that, in fact, all of such executions came to him successively, as thus issued, but error in admitting such proof, being in favor of the plaintiff, is one of which the latter can not be heard to complain.

SAME.—*Contradicting Return.*—A sheriff may not, but others than his sureties may, contradict such returns.

From the Wabash Circuit Court.

R. S. Taylor and *S. L. Morris*, for appellants.

W. S. Marshall, for appellees.

FRANKLIN, C.—This is a suit on a sheriff's bond. The facts out of which it grew are briefly these: On the 16th day of November, 1869, ten judgments were rendered in the Kosciusko Circuit Court against C. W. Card & Bro., amounting in the aggregate to $19,150.58. One of them was in favor of the relators, and was for $6,809.75. On the following day executions were issued on all the judgments and placed in the hands of the appellee James H. Cisney, who was the sheriff of the county. He levied all the executions at once, on a stock of merchandise, which he sold for $6,000. He applied the proceeds so as to pay six of the executions in full, one in part, and upon three, including that in favor of relators, he paid nothing. The returns made by the sheriff show that six of the executions came to his hands at thirteen minutes before three o'clock P. M. of the 17th day of November, 1869, and the others at twelve minutes before three P. M. of the same day. The proceeds of the sale were applied first to satisfy in full the six executions that came to hand at thirteen minutes before three o'clock. There then remained a surplus of $2,013.18, which the sheriff applied wholly on one of the executions that came to hand at twelve minutes to three. The claim made by relators is:

1. That the whole fund should have been distributed *pro rata* among the ten executions; or,

2. If the minute of time that intervened between the delivery of the six and the four gave a priority to the six, the surplus, after paying them in full, should have been distributed *pro rata* among the four.

The theory of the defence was that the returns did not state the true time of the delivery of any of the executions; that they were all delivered within a space of one minute, but consecutively; that the sheriff preserved a knowledge of the exact order of delivery, and was entitled to pay and did pay them in that order.

The question thus presented appears in various forms in the record. But before reaching the main question in dispute, there is a preliminary question arising upon the pleadings.

A demurrer was sustained to the second paragraph of the complaint, which is the first error complained of. That paragraph is a general one, setting up the bond, the judgment, execution, levy under it, sale, and "that the said Cisney has failed and refused to apply said sum of money received by him from said sale, or any part thereof, toward the satisfaction of said execution, and has refused to pay the same or any part thereof to said relators, although often requested thereto by them."

The objections to this paragraph of the complaint are, that the sheriff might have paid the money to the clerk, and that there was no special demand for the money averred. These objections are not well founded; the sheriff had no right to pay the money to the clerk; he might have returned it to the clerk with the execution, as so much money made by and applied upon the execution. The averment that he "refused to apply said sum of money or any part thereof received by him from said sale, toward the satisfaction of said execution," negatives the idea of any such payment to the clerk. And the averment that "he refused to pay the same or any part

thereof to said relators, although often requested thereto by them," is sufficient.

We see no good objection to this paragraph of the complaint. The court erred in sustaining the demurrer to it. Although the judgment must be reversed for the error in ruling upon the demurrer to the second paragraph of the complaint, still, as there is very little if any substantial controversy about the facts, it is desirable to have the law as applicable to them settled, and we proceed to an examination of the real controversy.

The question is first presented by a demurrer to the second paragraph of the answer. The substantial averment of that paragraph was, that the executions were not delivered at the times mentioned in the returns, but in a certain order, with an "appreciable space of time" between, and the money was applied in the same order.

The objection to this paragraph of answer is that the sheriff was bound by his returns as to the times when the executions came to his hands, and that upon the facts stated in the answer, together with the averments of the complaint not denied in it, it is insisted that the money should have been distributed *pro rata*.

The third paragraph of the answer sets up matters in estoppel, which perhaps are sufficiently pleaded and are left to depend upon the proof, which we do not discuss in considering this question.

In the various reasons assigned for a new trial, objections are made to the defendants introducing parol testimony to prove the times when the various executions were delivered by the clerk to the sheriff, and the order in which they were delivered.

The question is further presented by instructions asked and refused, among which the seventeenth was to the effect that in the case of a number of judgments taken in one day, followed by orders for execution written in the præcipe-book next day, and all brought to the notice of the clerk for the first

time at once, and by executions all issued, signed and docketed before the delivery of any, and by a delivery to the sheriff in one parcel, or in two parcels, or one by one, as rapidly as the sheriff could receive them, all the plaintiffs must be deemed to have exercised the highest diligence recognized by the law, and all would stand on the same footing. The eighteenth was to the effect that the sheriff's returns were conclusive as against him, and could not be contradicted by him in this action. The same question is thus substantially presented by the demurrer to the second paragraph of the answer, the objection to the introduction of testimony, and the refusal to give instructions asked.

Here were ten judgments rendered on the same day. The presumption is that upon the reading of the record next morning in court, all the records were signed at the same time. Before the signing of the record by the judge, no execution could issue upon any one of them. In the forenoon of the day of signing the record, præcipes were filed with the clerk for executions on each and all of the judgments; in the afternoon of the same day, the clerk issued executions on each and all the said judgments, and he delivered them to the sheriff in immediate succession in the order of the præcipes upon the præcipe-docket. The sheriff endorsed six of them as coming to hand at a certain minute, and the other four as coming to hand the succeeding minute. The judgment plaintiffs had each and all exercised the highest degree of diligence, in having each and all of their præcipes filed directly after the judgments were signed by the judge, and before execution had been issued upon any one of them. The præcipes could not all be written upon the docket at the same precise time; one had to follow another. The executions could not all be issued at the same precise time, but the clerk could issue them one after another in immediate succession, so as to make the issuing of the whole lot of executions one transaction. But he might have delivered all the executions in one bundle to the sheriff at precisely the same time, and the sheriff could

afterwards have endorsed the executions one after another, but all of precisely the same time of receiving; and, although the clerk delivered the executions one after another to the sheriff in immediate succession, we do not think that is sufficient to create a difference in the time of delivery, so as to give one a preference over another, but the delivery of all the executions to the sheriff ought to be regarded as one transaction, and that they were all delivered at the same time.

We do not see wherein the parol proof under the answer, if it were admissible, benefited appellees or injured appellants. But, as before stated, six of these executions were endorsed by the sheriff, "Come to hand at thirteen minutes before 3 P. M.," and four of them, "Come to hand at twelve minutes before 3 P. M." These endorsements purport to fix the time of delivery precisely. Twelve minutes before three is a point of time, not a space of time. If the sheriff's endorsements were true, four of these executions came to his hand at exactly the same instant of time, and became coequal liens. While the returns of a sheriff may be contradicted by others in certain cases, as to all matters required by law, in the usual course of official business, they are conclusive against the sheriff. *Lindley* v. *Kelley*, 42 Ind. 294; *Splahn* v. *Gillespie*, 48 Ind. 397; *Stockton* v. *Stockton*, 59 Ind. 574; *Hessong* v. *Pressley*, 86 Ind. 555; *Gregg* v. *Strange*, 3 Ind. 366.

If the returns made a preference in favor of the lot of six over the lot of four, then, as to the four executions endorsed by the sheriff, "Come to hand twelve minutes before 3 P. M.," the sheriff could not allege, and would not be permitted to prove, that they did not all come to his hand at the same time, so as to give either one of them a preference over either one or all of the other three.

This action was commenced in the court below thirteen years ago, and has been pending in this court on appeal over six years. The delays have been by agreement of counsel, based upon pending propositions for compromise. But, not-

withstanding the delays, a new trial is necessary before the case can be finally determined by litigation.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to overrule the demurrer to the second paragraph of the complaint, and for further proceedings.

Filed May 8, 1884.

No. 10,523.

FOUNTAIN COAL COMPANY *v.* PHELPS ET AL.

95 271
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167 448

PRINCIPAL AND AGENT.—*Purchase by Agent of Principal's Property at Sheriff's Sale.—Title.*—An agent employed to take care of and manage his principal's property can not acquire any title thereto by purchase at sheriff's sale, as against his principal, while such relation exists.

SAME.—*Trust and Trustee.*—Such agent can not acquire title to such property by such purchase without first severing such relation, and if any doubt exists as to his attitude, he will be deemed a trustee for his principal.

SAME.—*Notice.—Burden of Proof.*—When such agent attempts to sever such relation by notice, the burden is upon him to show that his principal was notified of such altered relation.

SAME.—*Acquiescence.—Ratification.*—A principal can not acquiesce in the purchase of his property by his agent until he knows that such purchase has been made, and the onus of showing it is upon the agent.

From the Fountain Circuit Court.

F. Ullmann, L. Nebeker and *H. H. Dochterman,* for appellant.

J. McCabe, C. M. McCabe, L. P. Miller and *E. F. McCabe,* for appellees.

BEST, C.—This action was brought by the appellant against the appellees, to set aside a sheriff's sale of its property, to

compel Samuel W. Phelps and S. Henry Phelps, as trustees, to account for its use and proceeds, and to enjoin the other appellees from declaring a forfeiture of the leases made by them for a portion of the property used for mining purposes.

Issues were formed, a trial had and judgment rendered for the appellees. A motion for a new trial was overruled, and this ruling is assigned as error. The ground of the motion was that the finding was contrary to the evidence and the law.

The undisputed evidence shows that on and prior to the 20th of March, 1878, the appellant owned and was operating a valuable mining property in Fountain county, in this State, consisting of the east half of block five, in Gish, Nebeker & Co.'s subdivision number one, of the west half of the northeast quarter of section one, township eighteen north, of range nine east; also a leasehold interest in the northeast quarter of the same section, except forty-five and one-half acres; also thirty-three acres off the east side of the east half of the northwest quarter of said section; also one horizontal engine and boiler, feed pumps, hoisting machinery, one shaft building and screens, one track scales, one blacksmith shop, eight tons of eight pound bank T rail, fifty-one miners' cars, two pumps in the mines, eight thousand props and caps, a shaft, four mules, one horse, one barn, one upright engine, three single houses, eighteen double houses and a quantity of tools and other implements; that from the 1st of September, 1875, until the 20th of March, 1878, Samuel W. Phelps was the superintendent of the appellant, and as such was in charge of its property and had the control and management of its business, and was allowed a salary of $3,600 per annum for a portion of the time, and $4,000 per annum for the residue; that his son, S. Henry Phelps, was also in the employ of the appellant, as its cashier and bookkeeper, until the 1st day of March, 1878, at a salary of $100 per month; that on the 7th day of July, 1877, said superintendent made a statement of the condition of said company, showing that it then owed him $4,655.22, and that the claims due it exceeded

by $557.46 all it owed subject to some deductions from certain accounts which might equal or exceed the excess. This was in addition to the mining property above enumerated; that on the 4th day of February, 1878, Samuel W. Phelps made out an account against the appellant, showing a balance then due him of $9,454.10 for services rendered and for money advanced, and assigned this account to his son, who paid him thereon $200 and made him his note for the residue, which was to be paid during the months of March, April and May following; that on February 11th, the son commenced an action upon such claim in the Fountain Circuit Court against the appellant, caused a summons to be served on his father, as the appellant's agent, and on the 25th day of February, 1878, took a judgment by default for $9,454.10; that on February 15th, 1878, George Nebeker and Abraham Gish commenced an action in said court against the appellant upon a note made by the son, as its agent, caused the summons to be served upon him, and on the 25th day of February, 1878, they took a judgment against the appellant by default for $1,130.60; that this claim was purchased by the son, on the 23d day of February, 1878, and after it was put into judgment the judgment was assigned to him; that prior to this time the funds of appellant were deposited in the bank of Nebeker & Gish, sometimes by Samuel W. Phelps, and sometimes by S. Henry Phelps, and the checks drawn by either in the name of the former were alike honored upon presentation; that upon this claim he paid nothing at the time of purchase, but deposited to his own credit $1,000, and after the judgment was taken this sum was applied upon the purchase and the balance then paid; that the father had employed the son as bookkeeper, and on the 1st day of March, 1878, the son notified him that he would resign, but notwithstanding this notice he continued thereafter to assist his father in keeping the books, though this was done, as he says, voluntarily and without compensation; that on the 6th day

of March, 1878, executions were issued upon these judgments, and all the mining property except the real estate was levied upon by virtue of the writ issued upon the Nebeker & Gish judgment; that this was not taken by the sheriff, but was left in possession of Samuel W. Phelps until the 20th day of March, when it was bid off by S. Henry Phelps for $9,450, all of which, less costs, was applied upon said writs, and receipts for the same were made by the father in the name of the son; that Samuel W. Phelps and S. Henry established the firm of "Samuel W. Phelps & Son," on the 1st day of April, 1878, and thereafter carried on the business as usual; that on the 20th day of April, S. Henry bid off the real estate for $450, which, less costs, was applied upon one of said writs; that the other appellees had leased the land then held by appellant, and, by the terms of the lease, a failure to comply with its stipulations authorized them to declare it forfeited, by giving notice in writing, and for the purpose of enabling S. Henry Phelps to hold the property thus purchased by him, the other appellees, on the 15th day of March, 1882, served such notice upon him and upon his father, declared such lease forfeited, and immediately executed another to him for such property. All this was done without notice to any officer or agent of the appellant other than said Samuel W. Phelps; at least, the record fails to show any such notice, and it likewise fails to show that any other officer or agent of the appellant had any notice of these proceedings at any time prior to the institution of this suit, which was commenced on the 27th day of March, 1882.

These facts are undisputed, and a mere recital of them shows that the sale of this property can not be sustained. Samuel W. Phelps was the superintendent of the appellant's business, and had the control and management of this property. It was his duty to protect and preserve it, and while he sustained such relation he could not acquire any interest in it to the prejudice and detriment of the appellant. This is conceded;

but it is insisted that S. Henry Phelps sustained no such relation, and by reason of such fact he was at liberty to make the purchase. This is based upon the assumption that the notice given his father that he would not act as clerk and bookkeeper after the 1st of March, 1878, divested him of all obligation to the appellant, and that thereafter he dealt with it and its property at arm's length. It is conceded that prior to this time he sustained such relation as precluded him from making the purchase; but it is insisted that such notice severed the relation. We think otherwise. The relation that he sustained prior to this time imposed upon him, as a like relation imposed upon his father, the duty to preserve and protect this property, not for himself or themselves, but for the appellant, their principal and employer, and he could not acquire any personal interest in such property in opposition to the wishes, and detrimental to the interests, of his principal, without first making an absolute and unequivocal surrender of his agency. A mere formal surrender was not sufficient; it was necessary that it should be made in good faith and without question, and that such altered relation should be fully communicated to the principal. If made simply for the purpose of acquiring an interest in the principal's property, or if done in such manner as to raise a reasonable doubt as to the agent's attitude toward the principal, such relation will be deemed to continue, and such agent treated as a trustee.

In *Bartholomew* v. *Leech*, 7 Watts, 472, it is said: "The most open, ingenuous and disinterested dealing is required of a confidential agent while he consents to act as such; and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar or so accordant with common honesty."

In *Ex Parte Lacey*, 6 Vesey, 625, the court held that where a trustee had acquired an interest in the trust property after

the relation had been severed, unless it appeared that the connection had been satisfactorily dissolved, the *cestui que trust* had his option to take back the property, even though no gain had been made by the purchase.

The same salutary doctrine is announced in the following cases: *McMahon* v. *McGraw*, 26 Wis. 614; *Krutz* v. *Fisher*, 8 Kan. 90; *Bowman* v. *Officer*, 53 Iowa, 640.

In the light of these authorities, S. Henry Phelps must be deemed a trustee at the time of his purchase, notwithstanding the fact that he gave his father notice that he would not serve the appellant after the 1st of March, 1878. This notice was a mere formality. It did not of itself sever the relation, and the relation was not in fact severed, as it appears that such agent thereafter not only had access to the books of the principal, but that he made entries as before. This operated to continue the relation, and the notice given does not appear to have affected it in the least.

In addition to this, it was necessary that this notice should have been given to the principal. It was not sufficient to serve it upon the father. It is apparent that his attitude was hostile to the best interests of the company, and while his duty required him to serve it, his interests induced him to act adversely. The assignment of the account to the son substantially without consideration, the institution of the suit, the service of process, the rendition of the judgment, the sale of the property, the execution of receipts for the purchase-money, the formation of the new firm, and the continuance of the business without interruption, show with unmistakable clearness the purpose of the entire transaction, and the whole is too transparent to withstand the scrutiny of a court of equity for a single moment. Under such circumstances, a notice served by the son upon the father will not bind the appellant, and without notice to the appellant the son's relation was not severed, and he could not, therefore, purchase the property and retain the title. *Davoue* v. *Fanning*, 2 Johns. Ch. 252; *Michoud* v. *Girod*, 4 How. 503, 550;

Blake v. *Buffalo Creek R. R. Co.*, 56 N. Y. 485; *Cook* v. *Berlin Woolen Mill Co.*, 43 Wis. 433; *Martin* v. *Wyncoop*, 12 Ind. 266.

The burthen rested upon S. Henry Phelps to show that this notice given his father was communicated to some other officer or agent of the appellant, and, in the absence of such proof, the presumption is that no such information was imparted. *Cook* v. *Berlin Woolen Mill Co.*, *supra*.

The point is also made that the delay to bring the suit for four years after the sale was made was such an acquiescence in it as now precludes a court of equity from disturbing it. This point is not well taken. A party can not acquiesce in a sale of his property until he knows that one has been made. There is no evidence in this case that the appellant knew its property had been sold for any length of time before the suit was commenced, and hence it does not appear that it acquiesced in such sale. The appellant is not bound by the knowledge possessed by Samuel W. Phelps, and aside from him it does not appear that any officer or agent of the appellant knew anything about the sale until about the time this suit was commenced.

The court below prefaced its finding with an opinion that it was incumbent upon the appellant to show that it did not have notice that S. Henry Phelps had ceased to act as its clerk, and that the sale had been made, and, applying this rule, found for all the appellees without any inquiry as to the appellees other than Samuel W. and S. Henry Phelps, and as this was wrong a new trial should be granted generally. For these reasons we think the court erred in refusing to grant a new trial, and for such error the judgment should be reversed.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at appellees' costs, with instructions to grant a new trial.

Filed May 8, 1884.

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104 590
127 43
95 278
131 401
133 109

No. 9730.

PETTY *v.* TRUSTEES OF THE CHURCH OF CHRIST, ETC.

CONTRACT.— *Church Subscription.— Consideration.— Object.— Performance.— Pleading.—Time of Payment.—Surplusage.*—A subscription read: "We, the undersigned, agree to pay the sum set opposite our respective names to the trustees of," etc., "for the purchase of a lot and the erection of a house of worship for the use of said church, size of said house to be 40 by 60; said sums to be paid as follows: one-half on June 1st, 1875, and one-half on January 1st, 1876." Complaint against a subscriber who was one of the trustees, to recover for his subscription.

Held, on demurrer, that the consideration for each subscription is the other subscriptions.

Held, also, that the complaint need not aver the completion of the house, such averment being surplusage.

SAME.—*Answer.*—An answer in such action, alleging that the house built was of different dimensions from that stated in the subscription, is insufficient.

SAME.—*Delivery Part of Execution.— Denial.— Confession and Avoidance.*— The delivery of a subscription is as much a part of its execution as is the signing thereof, and a denial of its delivery is a denial of its execution, and such answer can not embody matter properly pleadable in confession and avoidance only.

PRACTICE.—*Amending Pleading Waives Ruling on Demurrer.*—Error in sustaining a demurrer to a pleading is waived by amending the pleading.

SAME.—*Answer to Whole Complaint Bad as to One Paragraph.*—An answer to the whole of a complaint containing several paragraphs must, to withstand a demurrer, be sufficient as to each paragraph.

From the Delaware Circuit Court.

G. H. Koons, for appellant.

R. S. Gregory, R. C. Summers, W. March, C. W. Kilgore and *F. Ellis*, for appellee.

ELLIOTT, J.—It is alleged in the first paragraph of the appellee's complaint that appellant undertook to solicit subscriptions for the purpose of aiding in erecting a church edifice; that he agreed to head the list with a subscription of $200, and that he did sign the following agreement: "We, the undersigned, agree to pay the sum set opposite our respective names to the trustees of the Church of Christ, in the city of

Muncie, Indiana, for the purchase of a lot and the erection of a house of worship for the use of said church, size of said house to be forty by sixty; said sums to be paid as follows: One-half on the 1st day of June, 1875, and one-half on the 1st day of January, 1876." It is also alleged that by reason of the agreement of Petty other persons were induced to sign the agreement set forth, and other similar agreements to pay money for a lot and for the erection of a building thereon, and that "plaintiff did proceed to raise funds for the purchase of a suitable lot, and did purchase the same in the city of Muncie, and did raise money for the erection of a suitable house of worship, and did notify defendant, from time to time, of all the meetings for the settlement of all questions of importance, and did erect a house for worship on said lot, and said house is now being used regularly by said church." It is further averred that the sum subscribed was demanded and payment refused.

The agreement on which the complaint is founded fixes the time of payment of the appellant's subscription, and the right to demand payment did not depend upon the completion or non-completion of the house of worship. The subscription was payable at the dates specified, and the complaint would undoubtedly have been sufficient if it had not made a single statement concerning the completion of the building. The question, then, is whether the statement concerning the erection of the building makes the pleading bad.

The contract in cases such as this is a peculiar one. The consideration of the contract is not a promise on the part of the religious corporation to build a place of worship, for no such promise is averred, but the consideration is the mutual promises of the respective subscribers, each with the other. In speaking of a subscription similar to the present, the court said, in *Peirce* v. *Ruley*, 5 Ind. 69, that "the real consideration for his promise is the promise which others have already made, or which he expects them to make, to contribute to the same object." Subsequent cases fully adopt and enforce this

principle. *Jewett* v. *Salisbury*, 16 Ind. 370; *Northwestern Conference, etc.*, v. *Myers*, 36 Ind. 375; *Higert* v. *Trustees, etc.*, 53 Ind. 326.

It follows that the complaint stated the true consideration, and showed that it was yielded when it averred that others had been induced to promise money on the faith of the appellant's undertaking, and thus a cause of action was stated. The building of the church edifice was not a condition precedent to a recovery, and it was not necessary to aver it. This is decided in *Northwestern Conference, etc.*, v. *Myers, supra*, and seems free from doubt on principle.

The case of *Irwin* v. *Lee*, 34 Ind. 319, is plainly distinguishable from the present, for there the consideration on the part of one of the parties for the promise of the other was an agreement to do a direct and specific thing. Here, the person for whose benefit the subscription was made does not enter into any agreement at all. This is also true of the case of *Gillum* v. *Dennis*, 4 Ind. 417. If the church trustees had bound themselves by any agreement, we should have a very different case, but, as we have seen, there is no agreement of any kind on their part.

The time fixed for performance was a definite one, and payment did not depend upon the completion of the building. The rule, even where the promise to perform is directly from one party to the other, is thus stated in an elementary treatise: "Where the time fixed for payment is to happen or may happen before the time fixed for performance, an action may be brought for the money (or other consideration) before the performance." 1 Whart. Con., section 582.

It is an elementary rule of pleading that surplusage does not vitiate a complaint or declaration, and the allegation in the present complaint on the subject of the building is mere surplusage, for a cause of action is stated without it. If the allegation had gone so far as to show a complete defence, we should have been confronted by an altogether different ques-

tion, but the complaint shows no defence. It merely states that a building was erected and used.

The second paragraph of the complaint contains an averment that the building was erected, and shows also the contract and its consideration, the demand for the money and its non-payment, and avers that the appellant was one of the trustees of the church. We regard it as good.

The third and fourth paragraphs of the answer of appellant were amended after a demurrer had been sustained, and there was, therefore, a waiver of the exceptions taken to the ruling on the original paragraphs.

The ruling on the demurrer to the first paragraph of the answer is not discussed in the brief, and we, therefore, treat the specification of error founded on that ruling as waived.

The only remaining question which requires attention is that arising on the ruling on the demurrer to the fifth paragraph of the answer. This paragraph is addressed to the entire complaint, and unless it can be regarded as an answer to both paragraphs of that pleading, it must be deemed insufficient.

This paragraph of the answer, in its main tenor and drift, is a denial that there was any delivery of the instrument sued on, and if it is to be regarded simply as an answer denying the delivery of the contract, there was no error in sustaining the demurrer, because there were other paragraphs under which evidence showing that there was no delivery was admissible. It is abundantly settled that delivery is part of the execution of an instrument, and that a plea denying that the instrument was executed admits evidence that there was no delivery. Our cases are all to the effect that the delivery of an instrument is as much a part of the execution as the signing.

The answer, however, asserts that the building erected was not forty by sixty feet in size, as provided in the contract, but that its dimensions were only thirty-six by fifty-four feet; but

it does not aver that the change was made without the knowledge of the appellant. As he was one of the trustees, the fair inference is that he consented to the change, and if he did he can not now complain. Nothing is better settled than that a condition of a contract may be waived, and if this be the rule where the defendant has a voice only on one side, much the stronger the reason for the rule where he has a voice on both sides. The affirmative part of the fifth paragraph failed to answer the second paragraph of the complaint, and was, for this reason, if for no other, clearly bad.

We are of opinion, however, that the affirmative part of the paragraph of the answer is not entitled to consideration. It was said, in *Kimble* v. *Christie*, 55 Ind. 140, that the character of a pleading "must be determined from the general scope of its averments," and many cases have reiterated this doctrine. *Johnston* v. *Griest*, 85 Ind. 503; *Trippe* v. *Huncheon*, 82 Ind. 307; *Richardson* v. *Snider*, 72 Ind. 425; S. C., 37 Am. R. 168; *Neidefer* v. *Chastain*, 71 Ind. 363; S. C., 36 Am. R. 198; *Johnston, etc., Co.* v. *Bartley*, 81 Ind. 406; *Judy* v. *Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Platter* v. *City of Seymour*, 86 Ind. 323; *Mescall* v. *Tully*, 91 Ind. 96.

In *Cronk* v. *Cole*, 10 Ind. 485, it was held that a contract can not be confessed and denied in the same paragraph. The fifth paragraph must be regarded as an answer in denial.

It is not true that a demurrer confesses all of the allegations of the pleading to which it is addressed. Gould says: "Allegations which are impertinent, or immaterial, are not confessed, by a demurrer." Gould Pl. (4th ed.) 439. *Peyton* v. *Kruger*, 77 Ind. 486; *Platter* v. *City of Seymour*, *supra*. The allegations as to the size of the building are not pertinent to the main scope of the answer, and can not be regarded as confessed by the demurrer. Judgment affirmed.

Filed March 6, 1884; petition for a rehearing overruled May 8, 1884.

No. 10,706.

LEDFORD ET AL. *v.* LEDFORD.

PRACTICE.—*Cross-Examination of Witness.—Discretion of Court.—Abuse of.*—A very wide latitude is necessarily allowable in the cross-examination of an adverse witness, and how far it may be extended, in any case, is a question largely in the discretion of the trial court; and unless there is manifest abuse of such discretion, its exercise will afford no sufficient ground for the reversal of the judgment.

INSTRUCTIONS.—*Harmless Error.—Verdict.—Evidence.—Supreme Court.*—Where the verdict is in accordance with the evidence, and just and right upon the merits, it will not be disturbed by the Supreme Court, on account of error in the instructions.

From the Tipton Circuit Court.

C. N. Pollard, for appellants.

J. W. Kern, for appellee.

HOWK, C. J.—This was a suit by the appellee, Mary A. Ledford, against the appellants, Alexander H. and Columbus S. Ledford, commenced in the Howard Circuit Court. The object of the suit was to recover of the appellants, who were the brothers of the appellee, the value of her work and labor done at their instance and request, as their housekeeper, during the period of three years. Before answering the complaint, the appellants' motion to change the venue of the cause to some other county was sustained by the court, and the case was sent to the court below for issue and trial. There the cause was put at issue and tried by a jury, and a verdict was returned for the appellee, assessing her damages in the sum of $344.50. Over the appellants' motion for a new trial, the court rendered judgment against them for the damages assessed and costs.

In this court, the only error assigned by the appellants is the overruling of their motion for a new trial. The evidence is properly in the record. The appellants did not claim below, nor do they claim here, that the verdict of the jury is contrary to law, or that it is not abundantly sustained by

sufficient evidence. They do claim, however, that some of the rulings of the court occurring at the trial were erroneous, and these rulings were properly assigned by them, in their motion for a new trial, as causes therefor. Such of these rulings of the trial court, as the appellants' counsel have complained of as errors, in their brief of this cause, we will consider and decide the questions thereby presented.

Appellants' counsel first insists, in argument, that the trial court erred in permitting Nancy Cox, a witness for the appellants, on her cross-examination, over their objections, to answer the following question, propounded to her by appellee, to wit: "Did you not state to Henrietta Lewellyn on yesterday, in a conversation with her, and have you not stated to other persons, that you thought the plaintiff in this action ought to have something for the work she did for defendants?" The record shows that the appellants objected to this question at the time, "upon the ground that it was no part of any conversation, which they had introduced in evidence, with such witness, and that it was not legal or competent for such witness to state any opinion she may have with reference to what the plaintiff ought to have for her work done for the defendants, or any opinion that the plaintiff ought to have pay for her work done for the defendants." The court overruled the objections, the witness answered the question affirmatively and the appellants excepted.

It will be observed that the appellants' objections to the questions above quoted are much broader than the question itself, if, indeed, it can be said that they are applicable to such question. The witness was not asked to state her opinion upon any subject, but she was asked if she had not, in certain conversations referred to, expressed a certain opinion. It is one thing to ask a witness to state his opinion in regard to a matter in issue between the parties to the suit, but it is another and entirely different thing to ask the witness, on cross-examination, if he had not, in certain conversation, expressed a certain opinion. Doubtless, it is true that the opinion of a wit-

ness, to the effect that either one of the parties to the suit ought to recover, is incompetent evidence, and ought not to be admitted. Where, however, as in this case, the witness of one party has given evidence, on her examination in chief, the tendency of which, if believed by the jury, would have been to defeat a recovery by the other party, it certainly is competent for such other party to ask the witness, on her cross-examination, if she had not, in certain conversations, expressed a certain opinion seemingly at variance with her evidence in chief. A very wide latitude is necessarily allowable in the cross-examination of an adverse witness, and just how far it may be extended, in any particular case, is a question largely in the discretion of the trial judge. In the case in hand, we are of opinion that the court, in overruling appellants' objections to the question above quoted, and in permitting the witness to answer such question, committed no such error as would authorize or justify the reversal of the judgment.

Appellants' counsel next complains, in argument, of the instructions to the jury given by the court of its own motion. We have carefully considered these instructions, and construing them with reference to each other, and as an entirety, we think they contain a fair and correct statement of the law, applicable alike to the issues and evidence in the cause. In *Brooks* v. *Allen*, 62 Ind. 401, it was held that where a series of instructions, construed together, lay down proper rules of law and do not mislead the jury, the fact that one of them standing alone might be objectionable is not available as error. Besides, we have often held that a verdict, in accordance with the evidence and with justice, and right upon the merits, will not be disturbed here on account of erroneous instructions to the jury. *Toler* v. *Keiher*, 81 Ind. 383; *Cassady* v. *Magher*, 85 Ind. 228; *Norris* v. *Casel*, 90 Ind. 143. As we have already said, the appellants have not legally called in question, in this case, the sufficiency of the evidence to sustain the verdict, either in the trial court or in this court. Such

being the case, we can not reverse the judgment on account of any supposed error in any of the instructions given or refused. We think the verdict is right upon the evidence and in accordance with justice, and, therefore, we hold that the court did not err in overruling the appellants' motion for a new trial.

The judgment is affirmed, with costs.

Filed May 8, 1884.

No. 6600.

The Terre Haute and Indianapolis Railroad Company *v.* Graham.

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136 288

95 286
149 503
149 504
149 510
151 620
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95 286
162 470

Negligence.—*Railroads.*—*Wilful Injury.*—Gross negligence is not, as a matter of law, wilfulness; and in a suit against a railroad company for an injury resulting from such negligence, recklessness or wantonness, contributory negligence on the part of the plaintiff is a defence.

Same.—*Trespasser.*—A railroad company is not liable for an injury to a trespasser upon its right of way unless wilfully inflicted.

From the Putnam Circuit Court.

J. G. Williams, *D. E. Williamson* and *A. Daggy*, for appellants.

S. Claypool, *L. P. Chapin* and *J. McClary*, for appellee.

Zollars, J.—In April, 1870, appellee, while walking upon the track of appellant, near Greencastle, was struck, and his leg broken, by one of its engines drawing a passenger train. In July, 1871, the complaint, in three paragraphs, which we find in the record, was filed in the court below. Appellant demurred to each paragraph, and moved to strike out portions of the third. The demurrer and motion were overruled, and appellant excepted. Issue was joined by the filing of a general denial; the cause was tried, and judgment rendered for the appellee. From this judgment appellant appealed to this court, where the judgment was reversed for want of sufficient evidence, and a new trial ordered. It was also held that there was no error in overruling the demurrer

and motions to strike out. *Terre Haute, etc., R. R. Co.* v. *Graham*, 46 Ind. 239.

The case was retried upon the same issues, in May, 1875. The jury disagreed, and was discharged. In February, 1876, another trial was had upon the same issues, and resulted in a verdict, and, over a motion for a new trial, a judgment for $900 in favor of appellee.

From this judgment the appellant appealed, and filed the record in this court in October, 1877. The evidence, instructions, and motions to strike out portions of the complaint are in the record by bills of exceptions.

In this court, appellant has assigned for error the overruling of the demurrer to the complaint, and the motion for a new trial.

The first paragraph of the complaint states, substantially, that on the 27th day of April, 1870, appellant, by its agents and employees, so carelessly and negligently ran and managed a locomotive and train of cars on and along its track west from Greencastle, that without giving appellee any warning of the approach of said locomotive, etc., appellee, without fault on his part, was negligently and carelessly run upon, his leg broken, and otherwise injured, etc., to his damage, etc.

In the second paragraph, it is alleged, in substance, that on said day, appellee was walking upon and along the track of appellant, on the ends of the ties thereof, for the purpose of going from Greencastle to Greencastle Junction; that he did not know that a train was approaching him; that the employees of appellant well knew that he was on the track and in danger, yet the defendant, by its conductor, engineer and other employees, did then and there so carelessly and negligently run and manage a locomotive and train of cars, that without giving appellee warning of the approach of said locomotive, the said train was wilfully and purposely, and without any regard for the rights or life of appellee, with great force and violence run against appellee, without fault

on his part, by means whereof his leg was broken, to his damage, etc.

In the third paragraph it is alleged, substantially, that the portion of appellant's road between the depot at Greencastle and Greencastle Junction had long been, and then was, used with the license and assent of appellant as a way for foot passengers to pass and repass, on and along; that appellee was passing on and over said portion of the road on foot, as he had been accustomed to do; that appellant, well knowing the premises, wilfully and purposely, and without any regard for the rights or life of appellee, with great force and violence, ran its train against and wounded him, without fault on his part, etc., to his damage, etc.

The following facts are established without conflict in the testimony: Commencing at a mile-post west of Greencastle, the railroad of appellant runs almost due west for about 1,700 feet, when it curves sharply to the south until it reaches what is known as McLain's Second Crossing, distant from the mile post 3,400 feet. Commencing at about 700 feet west of the mile-post, there is a knoll on the south side of, and adjoining, the track, five feet high above the track, and extending along the track for the distance of 500 feet and over. Adjoining, and south of the track, and commencing at about 1,350 feet from the mile-post, there is another knoll, extending along the track west about 400 feet, and six and one-half feet high above the track. The west end of this knoll is 1,700 feet west of the mile-post. About 600 feet west of said post there is an elevation on the north side of the track. In other words, as some of the witnesses say, the road runs through a cut at the points named. From the cut there is a down grade to the McLain crossing of from fifty to sixty feet to the mile. On the day of the injury to appellee, he passed the depot of appellant in Greencastle; saw people waiting for a train; "guessed it was about train time," but did not know which way the train was expected to go. It was a bright, sunny day, with a strong April wind from the west. Appel-

lee started to walk on appellant's track from Greencastle to Greencastle Junction. The train which caused the injury consisted of an engine, tender, baggage and express cars, and three coaches. At this time air brakes were not in use, and the only means of stopping the train was by the application of hand brakes, and the reversal of the steam. The train was on time, passing over the road west, and running with the steam cut off, at the speed of about twenty-eight or thirty miles an hour. Upon the grade at and near where the collision occurred, the train, moving at its rate of speed, could not be stopped in a less distance than from 900 to 1,100 feet. After the appellee had passed over the track west a distance of 1,500 feet to the cut, he heard the whistle of the engine at the depot, and looked back twice to see if the train was coming. Moving from the center of the track, he continued walking upon the ends of the ties on the north side, not knowing that the train had time to overtake him. The train struck him about 350 feet west of the cut, or the knoll, on the south side of the track, farthest west. From this knoll to the point of collision, the track curves to the south about 100 feet. Before and at the time the train emerged from the cut, the fireman, whose place was on the south side of the engine as it was moving, was engaged in sweeping or cleaning the cab, and did not see appellee until after the collision by which appellee's leg was broken. The engineer, who occupied the north side as the train was running, did not see the appellee until after the train emerged from the cut, when it was about 300 feet from appellee. The engineer thought appellee turned, as if to look back, and moved farther towards the north end of the ties, yet seemed to be careless and unconscious of the approach of the train, or the danger, as if abstracted in thought, until struck by the train. A number of other persons in the immediate vicinity of appellee when injured, and others considerably further west, heard the whistle at the depot, and the noise of the train as it passed over the

track until the collision, saw the train before the collision and tried to warn appellee, but he either did not hear or did not heed.

Following the collision, the train was stopped after running several hundred feet. Immediately upon the train being stopped, employees engaged upon it ran to appellee to ascertain who was injured, and the extent of the injury. The conductor asked him if he did not hear the whistle, why he did not get off the track, and whether he was drunk or crazy? To this appellee answered that he was neither; that he was absent-minded, and blamed himself as much as the railroad company; that if any signals were given he did not hear them. The engineer told appellee that he was sorry for him. The conductor sent a flagman to stop trains which might be following, backed up the train, put appellee upon it, took him back to Greencastle, where he lived, and left him in the ladies' room of the depot, in the care of the station agent. At the depot, and on the former trial, appellee, when questioned about the accident, stated that before and at the time of the collision he was absent-minded. The whistle was sounded, the bell rung, the brakes set, and the steam reversed about the time of the collision.

The above, as we stated, are the facts about which there is no conflict in the testimony. As to whether or not the signals were given, and efforts made to stop the train, before the collision, there is conflict in the testimony; seven witnesses testify that these preceded, and five that they followed the collision. One witness testified that after the injury appellee stated that he heard the signals, but did not know that they were for him.

For the purposes of this decision, it may be said that there was evidence tending to show that no signals of warning were given before appellee was struck by the train.

Upon this, and the undisputed facts above set out, is the appellant liable under either paragraph of the complaint?

It is very plain that appellee is not entitled to a recovery

under the first paragraph, charging appellant with negligence. It is the general doctrine, and the settled law of this State, that where negligence is the issue, it must be a case of unmixed negligence; that, in such case, a party can not recover if it appear that by the want of ordinary care and prudence on his part he contributed to the injury, or if, by the exercise of ordinary care, he might have prevented the injury. *Bellefontaine R. W. Co.* v. *Hunter*, 33 Ind. 335 (5 Am. R. 201); *Higgins* v. *Jeffersonville, etc., R. R. Co.*, 52 Ind. 110; *St. Louis, etc., R. W. Co.* v. *Mathias*, 50 Ind. 65; *Jackson* v. *Indianapolis, etc., R. R. Co.*, 47 Ind. 454; Whart. Neg., section 300, and cases cited.

It is the well settled doctrine that although a traveller upon a public highway has equal rights with a railroad company to pass and repass over a crossing of such highway and railroad track, yet he must exercise reasonable care and prudence to avoid a collision with moving trains; that if he do not exercise such care, by the use of his sight and hearing, and by reason of such neglect contributes to his own injury, he can not recover from the railroad company, although it may have been guilty of negligence in the moving of its trains. *Bellefontaine R. W. Co.* v. *Hunter, supra; Toledo, etc., R. W. Co.* v. *Goddard*, 25 Ind. 185; *Pennsylvania Co.* v. *Sinclair*, 62 Ind. 301; *Terre Haute, etc., R. R. Co.* v. *Clark*, 73 Ind. 168.

In the case of *Bellefontaine R. W. Co.* v. *Hunter, supra*, the following doctrine was laid down: "No neglect of duty on the part of a railroad company will excuse any one approaching such a crossing from using the senses of sight and hearing, where these may be available; and injury where the use of either of such faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence, and there can be no recovery; unless the railroad company has been guilty of such conduct as will imply an intent or willingness to cause the injury."

In this case, as the uncontradicted testimony shows, appellee went upon, and remained upon, the track without looking

or listening for approaching trains, and without exercising any care whatever for his safety. He was guilty of such negligence as would have precluded a recovery had the collision occurred at a crossing, where he might rightfully be.

There is much more reason for the application of the above rule in the case in hearing than in cases where the collision occurs at road crossings. In this case, the collision occurred between crossings, at a point where appellee had no right to be; he was upon the track as a trespasser, hence no kind of care on his part could make his presence there other than unlawful. In such case, the company is not liable on the ground of negligence in the running and management of its trains.

In the case of *Jeffersonville, etc., R. R. Co.* v. *Goldsmith*, 47 Ind. 43, this court said: "But between the stations and public crossings the track belongs exclusively to the company, and all persons who walk, ride, or drive thereon are trespassers, and if such persons walk, ride, or drive thereon at the sufferance, or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking."

The company at all times owes a duty to passengers upon its trains to keep a lookout for obstructions upon the track, and if it fail to do so, and, by reason of such failure, a passenger suffer injury, the company is liable on the ground of negligence. But it can not be said, with reason, that it owes such duty to one trespassing upon the track. As to him, it is not bound to anticipate such intrusion, and is not liable if a collision occurs without its knowledge. In this case, the company is not liable, because its employees did not discover that appellee was upon the track sooner than they did, if, indeed, it was possible for them to have done so. See *Jeffersonville, etc., R. R. Co.* v. *Goldsmith, supra;* Cooley Torts, p. 660.

The liability of the company must be measured by the conduct of its employees, after they became aware of appellee's presence upon the track. That liability, however, after

such knowledge, can not be fixed by the negligence of such employees, and this for the reason that, as to such negligence, the contributory negligence of appellee would defeat his right of recovery.

The able and learned counsel for appellee contend with much earnestness, that there is a middle ground of liability in a case like this between ordinary negligence and wilfulness, such as in some cases has been termed "gross negligence," "recklessness," or "wantonness"; and that upon this theory appellee is entitled to recover, notwithstanding he may have been guilty of contributory negligence. In support of this, they cite authorities, among them some of the earlier cases in this State. We do not say that there are not degrees in negligence recognized in the books, and we think there are cases where the distinction is important; such as cases of bailments. But in a case like this, where contributory negligence may be a defence, we think that such defence is not controlled by the degree of negligence that may be charged upon the company, whether slight, ordinary or gross. Negligence, whether slight, ordinary or gross, is still negligence; and when the company is charged with nothing but negligence, contributory negligence is a defence. *Tonawanda R. R. Co.* v. *Munger*, 5 Denio, 255.

That contributory negligence may cease to be a defence, there must be something in the conduct of the party charged more positive and aggressive in its nature than negligence, or the simple omission of duty. Negligence is negative in its nature, implying the omission of duty, and excludes the idea of wilfulness. Whart. Neg., section 300. When wilfulness is an element in the conduct of the party charged, the case ceases to be one of negligence, and contributory negligence ceases to be a defence.

If there is a middle ground of liability between ordinary negligence and wilfulness, where and what is it? If we grant that the terms "gross negligence," "recklessness," and the inapt word "wantonness," express different degrees of negligence,

still the charge is one of negligence, and is lacking in the elements of wilfulness and purpose. And if it be admitted that ordinary negligence on the part of the plaintiff, contributing to the injury, will defeat a recovery based upon the charge of ordinary negligence on the part of the defendant, what shall be said when both plaintiff and defendant have been guilty of gross negligence, recklessness, or wantonness?

It seems to us that to adopt the theory of such middle ground of liability, is to adopt the doctrine of comparative negligence, as held in Illinois and one or two of the other States, which has never been adopted in this State, and the adoption of which would be a reversal of the whole line of our decisions upon the doctrine of contributory negligence. Under the rule of comparative negligence, the verdict is given to the party guilty of the least negligence. If the negligence of the parties, whether slight, ordinary, or gross, is equal, there can be no recovery, and hence, when the plaintiff is guilty of gross negligence, he can not recover, unless the injury is wilfully inflicted. *Chicago, etc., R. R. Co.* v. *Lee*, 68 Ill. 576; *Illinois Central R. R. Co.* v. *Hetherington*, 83 Ill. 510.

The authorities are not entirely harmonious in the use of terms, but upon a careful examination the difference will be found to consist more in what has been said by the judge delivering the opinion than in what has been decided. The terms "recklessly," "with gross negligence," and "wantonly" have been used in some cases, and in some of the earlier cases in this court, as though they might import something more than negligence. In some of the cases they were evidently used as synonymous with wilfulness. In the later and better considered cases in this court, however, these terms have been held to mean less than wilfulness, and nothing more than negligence in a case of this character.

In the case of *Pennsylvania R. R. Co.* v. *Sinclair*, 62 Ind. 301, it was charged that the train was run at a reckless and grossly dangerous speed. It was contended that the

evidence sustained the charge, and that the company was liable notwithstanding the plaintiff may have been guilty of contributory negligence. In the opinion of the court it is said: "There has been of late a very strong tendency of judicial opinion, adverse to the distinction between gross negligence and ordinary negligence, in the sense in which those terms are used in the class of cases to which we have above referred, and with that tendency the doctrine has been gaining ground in this, and at least some of the other States, that something more than mere negligence, however gross, must be shown, to enable a party to recover for an injury, when he has been guilty of contributory negligence; that, in such a case, something more aggressive than mere negligence must be alleged and proved. * * * When, therefore, the injury complained of is a negligent one merely, contributory negligence is a good defence to the action. It is only when the injury sued for is alleged, either in terms or in substance, to have been wilfully or purposely committed, that contributory negligence ceases to be a defence. * * * We are aware that there is a line of decisions establishing what is known as the English doctrine, to the effect that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him. * * * But we do not feel justified in disturbing what has been long accepted in this State as the better doctrine, after much discussion and consideration."

In the case of *Indianapolis, etc., R. R. Co.* v. *McClaren*, 62 Ind. 566, where wilfulness and gross negligence were charged, this court, in discussing the evidence, said: "We discard the term gross negligence; wilfully and purposely are preferable, as they have a more definite meaning, and the act done must come within that meaning. * * * The railroad company may be liable for the wilful acts of its employees; * * and their conduct in the management of the train,

where injury results, may be given in evidence as tending to show that the injury was wilfully and purposely inflicted."

In the case of *Cincinnati, etc., R. R. Co.* v. *Eaton*, 53 Ind. 307, in discussing the sufficiency of the complaint, this court, per WORDEN, C. J., said: "If the paragraph had alleged that the injury was committed wilfully and purposely, the allegation that the deceased was guilty of no negligence would have been unnecessary; for if he had been wrongfully or negligently upon the track, that would not have justified the defendant in wilfully and purposely running upon him. * * But the allegations of the paragraph are not equivalent to such charge. It is alleged, that the train was run 'recklessly and with gross negligence,' and that, by means of said 'recklessness and gross negligence,' the engine ran against the deceased. This does not imply that the injury was inflicted either purposely or wilfully. The definitions of the word recklessness, as given by Worcester, are heedlessness, carelessness, negligence. In the case of *The Lafayette, etc., R. R. Co.* v. *Adams*, 26 Ind.76, it seems to us that the signification of the word recklessness was extended somewhat beyond its legitimate import."

In the case of *Lafayette, etc., R. R. Co.* v. *Huffman*, 28 Ind. 287, this court said: "The complaint is fatally defective. After admitting facts which show negligence of the plaintiff, contributing to the injury, it charges that the defendant, in a wanton and careless manner, ran said locomotive, etc. The word 'wanton' does not mean wilful. It is defined by Webster as follows: 'Wandering or roving in gayety or sport;' 'licentious,' 'lewd;' 'extravagant,' etc. The word adds no force to the charge that the act was done in a careless manner." See, also, *Jeffersonville, etc., R. R. Co.* v. *Bowen*, 40 Ind. 545; *Evansville, etc., R. R. Co.* v. *Wolf*, 59 Ind. 89; *Bellefontaine R. R. Co.* v. *Hunter, supra; Jeffersonville, etc., R. R. Co.* v. *Bowen*, 49 Ind. 154; *Johnson* v. *Boston, etc., R. R.*, 125 Mass. 75; *Heil* v. *Glanding*, 42 Pa. St. 493; *Gillis* v. *Pennsylvania*

R. R. Co., 59 Pa. St. 129; *Jeffersonville, etc., R. R. Co.* v. *Goldsmith, supra; Illinois Central R. R. Co.* v. *Godfrey*, 71 Ill. 500; *Peoria Bridge Ass'n* v. *Loomis*, 20 Ill. 235.

Applying the proper rule to the case in hearing, we think the evidence does not make a case against the appellant on the charge in the second and third paragraphs of the complaint. There is no evidence which proves, or tends to prove, that the collision was the result of wilfulness on the part of appellant's servants. The presumption is that an able-bodied man, trespassing upon the company's track, will leave it before coming in collision with a moving train. Upon this presumption those in charge of the train have a right to act, at least until it is apparent that on account of some infirmity the trespasser is not able to look after his own safety. *Terre Haute, etc., R. R. Co.* v. *Graham*, 46 Ind. 239. See, also, *Telfer* v. *Northern R. R. Co.*, 30 N. J. 188.

In this case the engineer did not see appellee until the train was within 300 feet of him. It could not have been stopped in less than three times that distance. It was running on a down grade, at near thirty miles an hour. The engineer had but a few seconds in which to observe, think or act. At the speed the train was running, it passed over the 300 feet in about six seconds. There is nothing in the statement of the engineer concerning his observation of appellee in the few seconds preceding the collision, which indicates bad faith or wilfulness. The alarm whistle was sounded, the bell rung, brakes applied, and steam reversed at about the time of the collision, if not before; and the train was stopped as soon as it was possible to do so. Immediately after the train was stopped the engineer, conductor, and other employees upon the train, hastened to appellee, inquired after his injuries, put him upon the train and took him back to Greencastle, where he lived.

If "gross negligence" is chargeable to any one, it is to appellee; he knew he was walking upon dangerous ground. The track itself was a warning to him. He saw the people at the

depot waiting for a train, heard the whistle at the depot, and yet continued upon the track, taking no precautions for his safety. While others near him, and still others much farther away from the train, both saw and heard it, he continued upon the track, in ignorance of its approach.

If the doctrine of the Illinois cases should be applied to the facts in this case, the gross negligence of appellee would defeat his action, conceding that appellant was also guilty of gross negligence. *Illinois Central R. R. Co.* v. *Hetherington, supra.*

The twelfth instruction given by the court is as follows: "If the jury find that the plaintiff was walking along the railroad track of the defendant, that he knew it was about train time, and could have seen the train approaching by the exercise of ordinary diligence, and that he did not look for its approach, but remained upon the track until the train approached and struck him, then his own negligence contributed to the injury which he received, and he can not recover unless the injury was produced by the gross negligence of those managing the train; that is, unless it was wilfully, wantonly and recklessly done."

This instruction, we think, does not state the law correctly. The jury are told that the company is liable if the injury was wilfully, wantonly or recklessly inflicted, notwithstanding appellee may have been guilty of contributory negligence. We have seen that the words *reckless* and *wanton* do not mean wilful, and express nothing more than negligence. This instruction seems to have been based upon the theory that there is a middle ground of liability between ordinary negligence and wilfulness, upon which appellee might recover, notwithstanding his negligence, and so the jury doubtless understood it.

It follows from what we have said that the court below erred in overruling appellant's motion for a new trial. As the judgment must be reversed on account of this error, it will not be necessary for us to consider other alleged errors in the giving and refusal of instructions.

The judgment is reversed, at the costs of appellee, with instructions to the court below to sustain the motion for a new trial.

Filed May 28, 1883. Petition for a rehearing overruled May 9, 1884.

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170 307

No. 11,620.

Shields *v.* The State.

Criminal Law.—*Unlawful Sale of Intoxicating Liquor.—Juror.—Competency.*—A juror who believes that a moral man would not sell whiskey, and who would not as readily believe the testimony of one who so sells as he would that of a moral man, but who thinks he can nevertheless give the defendant an impartial trial, is not incompetent in a prosecution for selling liquor without license, it not appearing that the defendant was engaged in the sale of intoxicating liquors, or that the jurors were prejudiced against defendant.

Same.—*Evidence.—Premises.*—Proof upon trial of an indictment for the unlicensed sale of liquor to be drank on the defendant's premises, that the liquor was drank on the lot on which the defendant's shop was situated, out of glasses furnished by him, and that the same place was used for drinking by the defendant's customers, with his knowledge and consent, is admissible upon the question whether that place was on his premises.

From the Morgan Circuit Court.

J. V. Mitchell and —— *Cox*, for appellant.

F. T. Hord, Attorney General, *F. P. A. Phelps*, Prosecuting Attorney, and *W. B. Hord*, for the State.

Hammond, J.—The appellant was indicted and convicted for selling intoxicating liquor to be drank on his premises, without license. The case was tried by a jury. The overruling of the appellant's motion for a new trial, to which an exception was taken, is assigned for error.

Each of the persons called as jurors, in answer under oath as to his competency, testified that he did not believe a moral man would engage in the whiskey traffic, and that he would not believe the testimony of a witness whom he believed to be immoral on account of being engaged in that business, as readily as he would the evidence of one whom he believed

to be moral. The jurors each further testified that, notwithstanding their belief, they thought they could give the appellant a fair and impartial trial. The appellant challenged each juror for cause upon the evidence given as to his competency, but his challenge was overruled, and to this ruling he excepted.

Section 1793, R. S. 1881, provides that certain causes therein named, and no other, shall be good for challenge to any person called as a juror in any criminal trial. Among these cases is that the person so called is biased or prejudiced for or against the defendant.

A very large discretion must necessarily be lodged in the trial court in its decision as to the competency of jurors. It is only where there has been a manifest abuse of such discretion that this court can interfere. *Noe* v. *State*, 92 Ind. 92.

The testimony of the jurors as to their opinion of men engaged in the sale of intoxicating liquor can not be construed as manifesting personal ill-will or aversion to the appellant.

No question was asked the jurors as to whether they had any prejudice against the appellant, or doubt as to his veracity. For all that appears, they may have regarded him moral and worthy of belief, notwithstanding their opinion of the morality and veracity of men in general engaged in the whiskey traffic.

The court at the time of the challenges could not, without going outside of the record, say that the general opinion of the jurors as to a certain class of men included the appellant. The mere charge, like the present, in an indictment against a man for a single violation of the liquor law, does not require the court to know judicially that his business is selling intoxicating liquors.

The appellant assumed in his challenge that the jurors were incompetent, by reason of their opinion, to try one charged with a violation of the liquor law, whose business was selling intoxicating liquor. He also assumed that the court must know that the appellant was engaged in that business. Both

these assumptions were unauthorized. The bias or prejudice of one called as a juror may be ascertained by inquiry that will discover his feelings toward, and his likes or dislikes for, the defendant. But a juror should not be regarded as incompetent merely because of opinions entertained by him of men in general engaged in a certain pursuit or vocation. We would not be understood as holding that, if the examination of the persons called as jurors had shown that they were biased or prejudiced against the appellant, on account of his business or otherwise, to any extent that disqualified them as impartial triers, they would have been competent. In such case they would have been clearly incompetent. We are simply holding that prejudice and bias which render a juror incompetent are not legally to be presumed because of the juror's unfavorable opinion of men in general who are engaged in some particular business. In *Elliott* v. *State*, 73 Ind. 10, which was for violating the liquor law, it was held that a juror was not disqualified because of prejudice against the sale of intoxicating liquors, and of belief that such business was improper and immoral, if he could give the accused an unbiased hearing.

We think that the testimony of the persons called as jurors in this case did not show prejudice or bias against the appellant, and that there was no error in overruling the appellant's challenges to such jurors.

The evidence tended to show that the appellant sold the prosecuting witness a quart of intoxicating beer, which was carried by the witness, in a pitcher furnished by the appellant, to a place in the rear of the appellant's saloon, and there drunk out of glasses also furnished by the appellant. It was in dispute whether the place where the drinking occurred was on the appellant's premises. Evidence was introduced by the State, over the appellant's objections, tending to prove that about the time of the commission of the offence charged in the indictment, the place in question, which was on the same lot the saloon was upon, was used by appellant's customers,

with his knowledge, as a resort for drinking beer purchased of him. At the time of purchasing the beer, glasses were furnished by the appellant and used at the place in question in drinking the beer, and were then returned to the appellant. We think this evidence was competent to be considered by the jury upon the question as to whether the place where the prosecuting witness drank the beer was upon the appellant's premises. We may infer from the bill of exceptions that the court, with proper admonition to the jury, admitted the evidence complained of, only for the purpose to which it was pertinent. *Stout* v. *State*, 93 Ind. 150.

It is insisted that the evidence does not sustain the verdict. But as the bill of exceptions does not purport to contain all the evidence, this question is not presented by the record. Affirmed, with costs.

Filed May 9, 1884.

95 302
126 329

No. 9544.

DUFOUR *v.* ANDERSON.

PARTIES.—*Trespass.*—*Attachment.*—*Sheriff.*—When personal property seized by the sheriff by virtue of a writ of attachment is forcibly taken from his possession, the sheriff only can sue therefor.

From the Switzerland Circuit Court.

W. R. Johnston and *F. M. Griffith*, for appellant.

J. A. Works and *J. D. Works*, for appellee.

FRANKLIN, C.—Appellee sued appellant for wrongfully and forcibly taking from the sheriff of said county forty barrels of whiskey, which the sheriff had levied a writ of attachment upon in favor of appellee, and had taken the same into his possession.

The appellant filed a demurrer to the complaint, which was overruled, and an exception reserved. Issues were formed, and there was a trial by jury, verdict for appellee, and judgment upon the verdict.

The complaint reads as follows:

"The plaintiff, James V. Anderson, complains of the defendant, Charles J. Dufour, and says, that on the 10th day of April, 1878, Anderson W. Darling, who at said time resided at Carrollton, in the State of Kentucky, shipped on board the steamboat 'General Pike,' from Carrollton aforesaid, or from Prestonville, in the State of Kentucky, forty barrels of whiskey, to be taken by said steamboat, of which steamboat the defendant on said day was captain and master, to the city of Cincinnati, in the State of Ohio; and that on said day the plaintiff commenced an action in this court against the said Andrew W. Darling for the sum of $500 on a draft or bill of exchange drawn by Spillman, Halderman & Co., payable three days after sight to their own order, for the sum of $321.01, and directed to the said Andrew W. Darling at Carrollton, Kentucky, by the name and style of A. W. Darling, and dated Cincinnati, March 9th, 1878, which draft or bill of exchange was on said day endorsed to the plaintiff by said Spillman, Halderman & Co. And that at the time of commencing said action, the plaintiff filed affidavit and bond, as required by law, and sued out an order or writ of attachment against the property of said Andrew W. Darling, directed to the sheriff of said Switzerland county, Indiana, commanding him to seize and take into his possession the personal property, and attach the land, of the said Darling in said sheriff's county, not exempt from execution, or so much thereof as would satisfy the claim of the plaintiff in said action for $321.50, together with the costs of said action. And that said sheriff on said day, while said steamboat was lying at the city of Vevay, in said Switzerland county, Indiana, and made fast to the wharf-boat at said city in said county, went on board of said steamboat, and with the assistance of ——, a disinterested and creditable householder of said county, levied upon, seized and attached said forty barrels of whiskey belonging to said Darling on board of said steamboat, which whiskey was delivered into the posses-

sion of said sheriff by the defendant, Charles J. Dufour, then the captain and master of said steamboat; and after said sheriff had so levied upon, seized and attached said forty barrels of whiskey, and had removed from off said steamboat on to the wharf-boat to which said steamboat was fastened, ten barrels of said whiskey, the said Charles J. Dufour, the defendant, then captain and master of said steamboat, and David Lepper the clerk, and Oliver Noble the mate, of said steamboat, forcibly took from the said sheriff and from his possession said forty barrels of whiskey, and removed back on to said steamboat the ten barrels of said whiskey that the said sheriff had taken from off said steamboat and put on said wharf-boat, and took and carried away said forty barrels of whiskey, against the wishes and remonstrances of said sheriff, and converted the same to his own use, whereby the said plaintiff was deprived of and lost the benefit of the seizure and attachment of said whiskey for the payment and satisfaction of his said debt, accruing interest and the costs of said action." Wherefore the plaintiff says that he is damaged to the amount of $500, for which sum he demands judgment, and all proper relief.

The cause stated in the demurrer is, that the complaint does not state facts sufficient to constitute a cause of action in the plaintiff.

In the case of *Butler* v. *Borders*, 6 Blackf. 160, it was held that where a writ of attachment was levied on goods which did not belong to the defendant, the plaintiff in attachment, having taken no part in the levy, is not liable for the conduct of the officer who made it.

In the case of *Skinner* v. *Stuart*, 39 Barb. 206, it was held that, at common law, when personal tangible property of a debtor had been levied upon, by virtue of an execution or attachment, it is in the custody of the law, whose minister, the sheriff, is the proper person to bring actions to recover the possession or value thereof. The plaintiff can not sue therefor. The code does not authorize the plaintiff, in an attach-

ment suit, to commence an action to take possession of the tangible property levied on, or to take legal proceedings to collect or receive into his possession debts, credits and effects of the defendant.

In the case of *Schaeffer* v. *Marienthal*, 17 Ohio St. 182, it was held that, where personal property has been seized by the sheriff under writs of attachment, the sheriff and the attaching creditors can not, by virtue of their right under such proceeding, maintain a joint action to recover damages for its subsequent conversion or detention by a stranger; that the sheriff alone had the exclusive right to bring such action.

In Drake on Attachments, section 290, the following language is used: "It is, therefore, indispensably necessary that the officer should sustain such a relation to personal property which he has seized, as will enable him to hold it to answer the purpose for which it was attached. To this end, he is, by the levy of the attachment, and the reduction of the property into his possession, vested with a special property in the latter, which enables him to protect the rights he has acquired; and this property constitutes an insurable interest, which he may protect by obtaining insurance thereon, though he is not under obligations to do so.

"This special property of the officer continues so long as he remains liable for the attached effects, either to have them forthcoming to satisfy the plaintiff's demand, or to return them to the owner, upon the attachment being dissolved; but no longer. For any violation of his possession, while his liability for the property continues, he may maintain trover, trespass, or replevin. And he alone can maintain any such action; it can not be maintained by the attachment plaintiff." And the following authorities are cited in support thereof: *White* v. *Madison*, 26 How. Pr. 481; *Collins* v. *Smith*, 16 Vt. 9; *Gates* v. *Gates*, 15 Mass. 310; *Holt* v. *Burbank*, 47 N. H. 164; *Ludden* v. *Leavitt*, 9 Mass. 104; *Badlam* v. *Tucker*, 1 Pick. 389; *Lowry* v. *Walker*, 5 Vt. 181;

Lathrop v. *Blake*, 3 Fost. 46; *Brownell* v. *Manchester*, 1 Pick. 232; *Walker* v. *Foxcroft*, 2 Me. 270; *Strout* v. *Bradbury*, 5 Me. 313; *Whitney* v. *Ladd*, 10 Vt. 165; *Perley* v. *Foster*, 9 Mass. 112; *Gordon* v. *Jenney*, 16 Mass. 465; *Hall* v. *Walbridge*, 2 Aik. 215; *Polley* v. *Lenox Iron Works*, 4 Allen, 329; *Jordan* v. *Gallup*, 16 Conn. 536; *Ross* v. *Philbrick*, 39 Me. 29.

If the plaintiff could maintain this kind of an action under any circumstances, the complaint is certainly defective for not averring that Darling had accepted the draft, and for not showing that he had recovered upon his claim against Darling, and had obtained or was entitled to an order for the sale of the attached property for the payment of his debt; prior to such order it was the duty of the sheriff to hold the attached goods subject to the order of the court, and if the plaintiff in attachment, in the conclusion of his case, failed to obtain such order, it was the duty of the sheriff to return such goods to Darling, and in such case the plaintiff could not bring any action for the conversion of the goods. But, under the foregoing authorities, we think that the plaintiff in the attachment, in this case, had no such interest in the attached goods as enabled him to maintain an action for the value of the goods against a stranger for their conversion, and that the sheriff alone had the right to possession until the goods were legally disposed of by him, or taken from him under due process of law, until which time he was liable to the plaintiff for the value of the attached goods, not exceeding plaintiff's adjudicated claim. And he alone could bring an action against a stranger for their conversion.

The court below erred in overruling the demurrer to the complaint, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellee's costs; and the cause is remanded with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

Filed May 8, 1884.

No. 10,645.

JOHNSON *v.* METZGER, GUARDIAN.

GUARDIAN AND WARD.—*Failure to File Inventory.—Removal.*—The removal of a guardian for failure to file an inventory within three months from his appointment, as required by section 2521, R. S. 1881, is much in the discretion of the court, and its action in refusing to remove will not be reversed if an excuse be shown for the guardian's failure, which is not clearly insufficient.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellant.

J. Harrison, for appellee.

ELLIOTT, J.—The appellant petitioned the court to remove her guardian, and assigned cause in the following language: "That her guardian did not file within three months after his appointment a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and the value of the yearly rent of the real estate, although there then was such estate."

Appellee's answer to the petition is, in substance, as follows: That at the time of his appointment, and from thence continuously until April, 1881, no personal estate of any kind had come to his hands or knowledge; that the real estate belonging to his ward descended to her from her deceased father, and was at the time, and thence continuously until April, 1881, by order of the court, leased to William A. Reese, the administrator of the decedent's estate, for the purpose of realizing a sum sufficient to supply a deficiency in the intestate's personal estate; that no rents of the real estate of the ward were, or could have been, collected by the guardian until the property was released from the operation of the order of the court; that, at the April term, 1881, the appellee filed a proper inventory, reciting the foregoing facts, the value of his ward's estate, and its annual rental value; that at the March term, 1881, upon final settlement of the estate of his ward's father, and the receipt of the first sum of money re-

ceived by the appellee, he made out and filed a full report, exhibiting the condition of his trust as guardian, and that the report was duly examined and approved, and that the petition for his removal was not filed until the report had been approved.

We can not say that the court abused its discretion in holding the answer sufficient and refusing to remove the guardian. The matter of removing or refusing to remove guardians or administrators is one so much within the discretion of the lower court that the appellate court is very slow to interfere. It will not interfere at all unless it appears that there has been an abuse of the discretion with which the circuit courts are invested. The rule is correctly stated in *Young* v. *Young*, 5 Ind. 513, where it was said: "In cases like this, a large discretion must necessarily be left to the courts having original jurisdiction, and we will not disturb their action unless that discretion is grossly abused." *Barnes* v. *Powers*, 12 Ind. 341; *Nettleton* v. *State*, 13 Ind. 160; *McFadden* v. *Ross*, 93 Ind. 134.

The case of *Wood* v. *Black*, 84 Ind. 279, differs from the present, in this, that there no excuse was shown for a failure to file an inventory, while in the present there is an excuse pleaded which we think justified an exercise of discretion in favor of the guardian. In that case, we may add, it was not averred that the guardian had ever filed an inventory, or taken any steps toward exhibiting to the court the condition of his ward's estate. It may well be that where there is no excuse at all shown, the failure to remove the guardian would be an abuse of discretion, but where some excuse is shown, we think it is our duty to uphold the action of the court of original jurisdiction, except in cases where the excuse offered is clearly unreasonable and insufficient. Judgment affirmed.

Filed May 8, 1884.

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No. 11,021.

HENDERSON *v.* TRUITT.

CONTRIBUTION.—*Equities Between Purchasers of Mortgaged Premises.*—Where a mortgagor sells, and by warranty deed conveys, a part of mortgaged lands, such deed exempts the part sold from contribution to either the mortgagor or a subsequent purchaser of the residue of such lands.

SAME.—*Second Purchaser can not Enforce Contribution Against First.—Redemption by Wife.*—If foreclosure be had in such case against both purchasers, and, under a proper decree, the lands of both be sold, neither the last purchaser nor his wife, on redeeming from such sale, can compel the first purchaser to contribute.

SAME.—*Irregularity in Rendering Judgment.*—It can make no difference in such case, that decree was entered, on default of the second purchaser, by agreement between the plaintiff and the first purchaser, but without notice to or cross complaint against the second purchaser, that the land of the latter should be first offered for sale.

From the Montgomery Circuit Court.

G. W. Paul, M. D. White and *J. E. Humphries*, for appellant.

E. C. Snyder, B. T. Ristine, T. H. Ristine and *H. H. Ristine*, for appellee.

NIBLACK, J.—Complaint by Sarah Henderson against Sarah E. Truitt, to which a demurrer was sustained, and upon which there was final judgment for the defendant upon demurrer.

The complaint stated that on the 3d day of September, 1866, one Samuel D. Jones was the owner of the following real estate, in Montgomery county, in this State, to wit: The east half of the northeast fractional quarter of section one (1), in township nineteen (19) north, of range five (5) west, and six rods from off the east side of the west half, of the northeast quarter of said section one (1); that said real estate was conveyed to Jones by James Graham and wife and Nathan Graham and his wife; that on said 3d day of September, 1866, Jones and his wife executed to the said James Graham and Nathan Graham a mortgage on said real estate to secure the payment of the purchase-money due from Jones; that said

mortgage secured, amongst others, one note for $1,050, which the Grahams assigned to one Samuel Binford; that, on the 11th day of September, 1871, Jones and wife sold, and by warranty deed conveyed, to one John McClamrock, a part of the real estate which had been mortgaged to the Grahams as above, and described as sixty acres from off the north end of the east half of the northeast fractional quarter of section one (1), in township nineteen (19) north, of range five west; that, on the 25th day of January, 1873, Jones and wife conveyed to one James Henderson, by warranty deed, another part of the real estate which had been mortgaged as above to the Grahams, and described as thirty-three acres from off the south end of the east half of the northeast fractional quarter of section one (1), in township nineteen (19) north, of range five (5) west, and six rods in width from off the east side of the west half of the said northeast fractional quarter of said section one (1), above described, both of which two last named deeds were duly recorded; that, on the 24th day of May, 1873, John McClamrock sold, and with his wife conveyed, the tract of land purchased by him of Jones and wife, as herein above set forth, to the defendant Sarah E. Truitt; that at the time the defendant so purchased the tract of land conveyed to her by John McClamrock, the deed executed by Jones and wife to James Henderson was on record in the proper recorder's office; that John McClamrock intended to purchase also the north half of the strip of land six rods in width taken from the east side of the west half of the said northeast fractional quarter of section one (1), herein above referred to, and Jones and wife also intended to convey the said north half of that strip of land to him, but did not do so; that McClamrock went into the possession of said north half of said strip of land, as well as the land conveyed to him, in the belief that it was included in the deed of Jones and wife to him; that the defendant succeeded to the possession of that half of said strip of land believing that it was included in the deed of McClamrock to her, under which she claimed title; that

the legal title to said entire strip of land had, however, all the while remained in Henderson under the deed to him from Jones and wife, to which reference has already been made; that the plaintiff was at the time said last named deed was made, and still is, the wife of said Henderson; that the land occupied by Henderson is of the value of $1,000, and the north half of the strip of land referred to, and occupied by the defendant, is, with the improvements upon it, of the value of the like sum of $1,000; that the note assigned to Binford remained unpaid, and Jones became a non-resident of this State and insolvent; that at the February term, 1881, of the Montgomery Circuit Court, Binford brought suit to foreclose the mortgage executed by Jones and wife upon all the mortgaged lands, making the defendant and this plaintiff, and others, defendants to such suit for foreclosure; that the plaintiff and her husband made default in that suit; that the defendant appeared and filed an answer to the complaint of foreclosure, asking that the land conveyed to Henderson be first sold to satisfy the mortgage debt, but did not file any cross complaint demanding such relief; that at said term Binford obtained a judgment for the sum of $1,187 and a decree of foreclosure upon all the mortgaged lands; that at the request of Binford and the defendant, the court made a finding that thirty-three acres taken from the south end of the east half of the northeast fractional quarter of section one (1), herein above several times described, and that the south part of the strip of land six rods in width, heretofore more particularly designated, extending the full length of said thirty-three acre tract, were sold to Henderson, the plaintiff's husband, after McClamrock had received a conveyance for the more northern part of the said east half of the northeast fractional quarter of said section one (1); that the court thereupon ordered that the lands so found to have been sold to Henderson, after the sale to McClamrock, should be first offered for sale to satisfy the mortgage debt, and that in the event such lands did not sell for enough to accomplish

that purpose, so much of the remaining mortgaged lands as might be necessary to pay such debt should be sold; that said order as to the manner in which the mortgaged lands should be sold was made without any cross complaint being filed, and without notice either to Henderson or to the plaintiff; that a copy of the decree of foreclosure was issued to the sheriff of Montgomery county, who duly advertised the mortgaged lands for sale, and first offered the south ends of two tracts included in the mortgage for sale, as directed by the decree, and, not being able to sell the same for enough to pay the mortgage debt, he offered in addition the north part of the six rods in width strip of land in the possession of the defendant; whereupon one James McClamrock bid for the thirty-three acre tract taken from the south end of the said east half of the northeast fractional quarter of section one (1), and for the entire strip of land, six rods in width, the sum of $1,294.96, and, no person bidding more, the said two tracts were struck off and sold to him for that sum, he paying the purchase-money to the sheriff and receiving a certificate of his purchase thereof; that the defendant failed to redeem the lands so sold by the sheriff, or any part thereof, and that the plaintiff, as the wife of James Henderson, on the day before the time for the redemption of the same expired, did redeem said lands by paying to the clerk of the Montgomery Circuit Court the sum of $1,339.39; that at the time said lands were so redeemed, the legal title to both tracts was in the plaintiff's husband, but the defendant was in the possession of the north part of the strip of land six rods in width as the equitable owner thereof; that James McClamrock accepted the redemption money so paid into the clerk's office by the plaintiff; that, as the lands were sold as an entirety, the plaintiff could not redeem any specific part, but was compelled to redeem the whole, and that by reason of the premises the plaintiff has acquired a lien on the said north part of the strip of land six rods in width, claimed by the defend-

ant, for its proportionate share of the amount of money paid to redeem all that was sold by the sheriff.

Wherefore the plaintiff demanded that an accounting might be had to ascertain the amount which ought to be charged against the said north part of the strip of land, six rods in width, in the possession of and claimed by the defendant as its share of the redemption money paid by the plaintiff; that the plaintiff might be subrogated as against that tract of land to all the rights of Binford under the decree of foreclosure, and that she might have all other proper relief.

When the estates of two persons are subject to a common encumbrance, and one pays the encumbrance for the benefit of both, he has the right, either to hold both estates thus redeemed until the other party shall pay his equitable proportion of such common encumbrance, or he may enforce contribution from the other party for such equitable proportion. But in all such cases the equities must be equal. Hence, if the party discharging the encumbrance is primarily liable for its payment, he can claim nothing from the other, however much the latter may be benefited by having the encumbrance removed from his property.

"A mortgagor who has sold a portion of the land covered by the mortgage by warranty deed can not claim contribution of the purchaser, because he is himself liable for the whole debt. Neither can a subsequent purchaser call upon a prior one for contribution, because such subsequent purchaser acquires only the rights the mortgagor then had, and therefore the equities of the two purchasers are not equal. * * *

"When a mortgage is foreclosed by a suit in equity or an equitable suit under the codes adopted in many States, the equities of purchasers of portions of the mortgaged estate are protected by a direction in the decree of sale that the parcels be sold in the inverse order of alienation." 2 Jones Mort., section 1089. *Chase* v. *Woodbury*, 6 Cush. 143; *Kilborn* v. *Robbins*, 8 Allen, 466.

Where a mortgagor sells a part of the mortgaged land by

warranty deed, such deed exempts the land conveyed by it from contribution in favor of the mortgagor, or any one else claiming the remaining mortgaged lands under him, with notice of the conveyance. 2 Jones Mort., sections 1090, 1091.

As has been seen, the purchase by Henderson of a part of the mortgaged lands was nearly a year and a half subsequent to the time at which John McClamrock received a warranty deed for the part purchased by him. Henderson, therefore, became the purchaser of that portion of the mortgaged lands which remained in Jones after he and his wife had conveyed and warranted a part to McClamrock. Consequently, applying the doctrine, deduced from the authorities as above, to the facts, as we find them in the complaint, the lands purchased by Henderson became primarily liable for the payment of the note sued on by Binford. If, therefore, Henderson should have paid that note, or have discharged the decree of foreclosure entered upon it, he would have acquired no right of contribution against the defendant as the grantee of McClamrock. As the plaintiff acquired the right to redeem the lands from the sheriff's sale through her marital relations with Henderson, it would seem to follow, as an inevitable consequence, that she can assert no greater right, in that respect, than Henderson could have done upon payment of the mortgage debt.

Our inference from the facts pleaded is, that the complaint did not make out a case for contribution against the defendant. In our opinion, the complaint, also, failed to state facts entitling the plaintiff to subrogation to any right to proceed directly against that part of the mortgaged lands held by the defendant. *Bradley* v. *George*, 2 Allen, 392. By the terms of the decree of foreclosure, which was acquiesced in by, and is hence binding upon, all the parties to it, Binford was required to proceed primarily against the land held by and in the possession of Henderson. If, therefore, all the parties interested in that decree, and necessary to have given full jurisdiction in the premises, had been brought before the

circuit court by this proceeding, the plaintiff could not have been subrogated to any remedy more comprehensive than was accorded to Binford, and in the event of her subrogation to the rights of Binford, she would be compelled to proceed primarily, if at all, against the property of Henderson, as Binford was required to do by the decree under which the lands were sold.

The judgment is affirmed, with costs.

Filed May 9, 1884.

No. 9,978.

DENNY ET AL. *v.* BUSH ET AL.

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148 149
95 315
153 246

HIGHWAYS.—*Remonstrance.*—*Res Adjudicata.*—*Public Utility.*—*Damages.*—Where a remonstrance, alleging inutility, has been filed against a petition for a highway, and decided against the remonstrants by the board of commissioners, upon the report of reviewers, a subsequent remonstrance upon the same ground, by any of such remonstrants, will not lie, but may be filed, before final action by the board, for damages.

SAME.—*Appeal.*—*Refiling Remonstrance in Circuit Court.*—It is error in the county board to dismiss such remonstrance for damages, but a remonstrator can not, upon an appeal to the circuit court, in which he does not join, there refile such remonstrance.

SAME.—*Plea in Abatement in Circuit Court.*—Where, upon such appeal to the circuit court, a jury has been sworn to try the case, and some evidence introduced, the remonstrants can not then first file a plea in abatement, alleging objections to the qualifications of some of the petitioners.

SAME.—Such a plea in abatement, alleging that one of the petitioners had been induced to sign the petition upon the promise of other petitioners to build a fence which would be rendered necessary by the location and opening of the highway, is insufficient.

From the Marion Circuit Court.

E. P. Ferris, *J. S. Ferris*, *F. J. Van Vorhis* and *W. W. Spencer*, for appellants.

F. Winter and *W. W. Herod*, for appellees.

BICKNELL, C. C.—The thirty-three appellants in this case filed their petition with the county board for the location of a highway in Pike township, in Marion county.

The board found that the petition was signed by twelve freeholders of the county, six of whom resided in the immediate neighborhood of the proposed highway, and that due notice had been given. Viewers were appointed, who reported that the road would be of public utility, and that they had laid it out on the line proposed, thirty feet in width.

The appellees and forty-three others, freeholders of said county, residing along the line of the proposed highway, filed a remonstrance against the same, alleging that it would not be of public utility. The board then appointed other viewers to examine and report as to public utility, and they reported that the highway would be of public utility.

The appellee Zachariah Bush then filed his remonstrance, claiming $750 damages. Reviewers were then appointed, who reported, assessing the damages of said Bush at $50.

At this stage of the proceedings, at the March term, 1881, of said county board, that being the fourth term after the filing of the original petition, the appellee William A. Fleming and one Eliza A. Boughton filed separate remonstrances, claiming damages, and also alleging that the road would not be of public utility. Fleming's remonstrance was dismissed on the motion of the petitioners, and said Eliza A. Boughton then dismissed her remonstrance. Thereupon the county board ordered that the highway be opened, etc.

From this final order Zachariah Bush appealed to the Marion Circuit Court, and he filed the appeal bond, with surety. No other appeal was taken. The appeal at the September term of said court was continued. At the December term, 1881, of said court, a jury was empanelled and sworn to try the cause, and after the counsel had made their opening statements, on motion of the said William Fleming, and over the objection of the petitioners, he was permitted to reinstate his separate remonstrance for damages and on account of public inutility, which had been dismissed by the county board, he having taken no appeal from such dismissal. The petitioners

then moved the court to dismiss the remonstrance of said Fleming, and this motion was overruled.

The trial then proceeded, and after the petitioners had examined two witnesses, the court, over the objection of the petitioners, permitted the defendants to file a verified plea in abatement, which stated, in substance, that Eliza Roberts, one of the signers of the petition, had been induced to sign it by the written promise of two of the other signers, that if she would sign it they would build a fence for her thirty rods long and eight rails high, and would furnish the necessary rails and chunks therefor.

This plea was sworn to by said defendant Zachariah Bush; it stated that he had no knowledge or information of such inducement in time to plead it before the county board, and that he could not have discovered it with reasonable diligence before filing his remonstrance with the board.

The petitioners jointly and severally demurred to said plea in abatement, for want of facts sufficient to constitute a defence to their petition or plea in abatement in this proceeding. These demurrers were overruled.

The plaintiffs replied to the plea in abatement in four paragraphs:

1. That before said Eliza Roberts signed said petition, more than twelve freeholders of Marion county, of whom more than six resided in the immediate neighborhood of said proposed highway, had signed said petition, and that said highway is wholly in said county.

2. Stating the same facts, and naming twenty-four of such signers, and averring that only two of the thirty-three petitioners signed the petition after said Eliza Roberts signed it.

3. This was a general denial.

4. That said twenty-four signers, naming them, were all resident freeholders of said county, of whom more than six resided in the immediate neighborhood of said proposed highway; that the promise mentioned in said plea in abatement

was made without the knowledge of said signers, and they never ratified it; and that public utility, necessity and convenience demanded the location of said highway.

The defendants separately demurred to each of the first, second and fourth paragraphs of said reply for want of facts sufficient. The demurrers were sustained.

The court then, over the objection of the petitioners, gave leave to both defendants to withdraw their remonstrances, and said remonstrances were withdrawn, and the court, over the objection of the petitioners, discharged the jury, and called a new jury to try the issue on the plea in abatement and the third paragraph of the reply thereto. Upon that issue the new jury found for the defendants. The petitioners moved for a new trial, for the following reasons:

1, 2 and 3. The verdict is not sustained by sufficient evidence, and is contrary to law and to the evidence.

4. Error of law occurring at the trial, in this: (*a.*) In permitting William Fleming to become a party defendant and to file a remonstrance after the jury had been sworn and the counsel on both sides had made their opening statements. (*b.*) In allowing defendants to plead in abatement, after the jury had been sworn to try the issues, and after the examination of two witnesses, remonstrances having been filed with the county board, and no matter in abatement having been pleaded before the board, and in ordering the plea in abatement to be first tried. (*c.*) In ordering the jury to be re-sworn, over the objection of the petitioners. (*d.*) In refusing to permit the petitioners to open and close the case. (*e.*) In refusing to permit the petitioners to prove that more than twelve resident freeholders of the county, of whom six resided in the immediate neighborhood of the proposed highway, had signed said petition—this evidence being offered before the defendants introduced evidence in support of their plea in abatement. (*f.*) In refusing to permit the plaintiffs to prove, after the defendants had introduced their evidence in support of the plea in abatement, and had rested, by one Harrison Foreman, that

more than twelve freeholders, residents of said Marion county, had signed said petition before Eliza Roberts signed it, and that more than six of said freeholders lived in the immediate neighborhood of said proposed highway. (*g.*) Because the court erred in discharging the jury, over the plaintiffs' objections, upon the trial of the issues as originally formed in this case.

The motion for a new trial was overruled. The petitioners then moved the court for judgment in their favor, establishing the highway, because of the withdrawal of said remonstrances, and because the plaintiffs gave and offered to give all the evidence necessary to sustain their petition. This motion was overruled, and judgment was rendered "that the petition and proceedings of the plaintiffs be in all things abated, and that the same be dismissed" at plaintiffs' costs. To this judgment the plaintiffs excepted, and they appealed therefrom.

The following is the assignment of errors:

1. The court erred in permitting the remonstrance of William A. Fleming to be reinstated and filed in the circuit court, he not having appealed from the decision of the board of county commissioners.

2. The court erred in overruling the objections of appellants to the filing and reinstatement of the remonstrance of William A. Fleming.

3. The court erred in overruling the motion of appellants to dismiss the remonstrance of William A. Fleming.

4. The court erred in overruling the objections of the appellants to the filing of the appellees' plea in abatement.

5. The court erred in overruling the appellants' motion to proceed with the trial of the cause, and in permitting the plea in abatement to be filed.

6. The court erred in overruling the appellants' demurrer to said plea in abatement.

7, 8, 9 and 10. The court erred in sustaining appellees' demurrers to the first, second and fourth paragraphs of appellants' reply.

11. The court erred in discharging the jury over the objections of the appellants, after the jury had been empanelled and sworn to try the cause and two witnesses had been examined.

12. The court erred in overruling appellants' motion for a new trial.

13. The court erred in overruling appellants' motion for a judgment in their favor.

The first three of the foregoing specifications of error present the question as to the legality of the action of the court in introducing into the cause the remonstrance of William A. Fleming, claiming damages and alleging that the road would not be of public utility. This remonstrance stated that Fleming was the owner of land through which the highway would pass; it was the same separate remonstrance which the county board had dismissed. As to its allegation in reference to public utility, it was properly dismissed; that matter had already been determined by the report of the viewers appointed on a remonstrance signed by Fleming himself and forty-four others. Fleming had no right to remonstrate again for want of public utility, but his remonstrance was good as to damages, and was in time for that purpose, having been filed before the final action of the county board. R. S. 1881, sections 5019, 5020.

The county board erred in dismissing Fleming's claim as to damages. Fleming might have appealed, but he did not: if he had appealed, the case would have been like that of *Breitweiser* v. *Fuhrman*, 88 Ind. 28, in which it was held that a party who had been prevented by the wrongful act of the county board from filing his remonstrance for damages before the final action of that body should be permitted, on an appeal by him, to file his remonstrance for damages in the circuit court. In *Smith* v. *Alexander*, 24 Ind. 454, a party who had not appeared at all before the county board was permitted, the other parties not objecting, to appear in the circuit court and file a remonstrance for damages, but here is a

different case. Fleming was before the county board and did not appeal. Without appealing he could not object to the action of the county board upon his remonstrance for damages: In the case of *Leffel* v. *Obenchain*, 90 Ind. 50, it was held that an issue formed by A. as to his claim for damages affects him and the petitioners only, and that no appeal from an order awarding or refusing damages to another can affect it, and that a party, who is dissatisfied with the action of the county board as to his claim for damages, must appeal in order to have that question retried in the circuit court. He can not have the benefit of a trial *de novo* without an appeal. The appeal taken by Bush alone had nothing to do with the order made as to Fleming's damages. We think the circuit court erred in permitting Fleming to file his remonstrance. He not having appealed, it was too late to introduce such a new issue after the jury was empanelled and sworn; the jury was not sworn to try that issue. And it has been decided repeatedly that ordinarily the only issues to be tried in the circuit court on appeal are those made before the county board. *Green* v. *Elliott*, 86 Ind. 53, and cases there cited. It follows that the court below erred in overruling the motion of the petitioners to dismiss said remonstrance of Fleming.

The court below erred also in permitting the plea in abatement to be filed. This cause was tried in December, 1881; it was too late for a plea in abatement after the jury had been sworn and witnesses examined; the plea was an objection to the qualifications of some of the signers of the petition; there was no such objection made before the county board; such objections, if known, must be made before the appointment of viewers; if not so made, the finding of the board as to the competency of the petitioners is conclusive. *Little* v. *Thompson*, 24 Ind. 146.

And the court erred in overruling the petitioners' demurrer to the plea in abatement; it was clearly bad.

The petition was signed by thirty-three persons; the plea

does not show that any of the parties to the agreement therein set forth possessed any of the qualifications of proper petitioners required by the statute. In *Hays* v. *Parrish*, 52 Ind. 132, the objection was made that John Parrish, named as one of the petitioners, did not sign the petition. The court said: "The petition, as has been stated, was signed by forty-eight persons, and as the board acted upon it, appointed viewers, and ordered the highway laid out in pursuance of it, it will be presumed that there was sufficient proof before the board that enough of the signers had the necessary qualifications, although the petition was not signed by Parrish." The plea does not show that any one of the three parties to the contract was required to make up the twelve required by the statute.

The substance of the plea was bad. The contract filed with the plea was not an illegal contract, nor in any way opposed to public policy or sound morals. *Cummins* v. *Shields*, 34 Ind. 154; *Hayes* v. *Board, etc.*, 59 Ind. 552; *State* v. *Johnson*, 52 Ind. 197; *Stilson* v. *Board, etc.*, 52 Ind. 213.

In the case of *Makemson* v. *Kauffman*, 35 Ohio St. 444, a majority of the land-owners were required to sign the petition for a gravel road before viewers could be appointed. Three such signatures were obtained by the promise of others interested to pay whatever assessments were made on their lands. The court said: "We are unwilling to say that the mere circumstance that a land-owner of the vicinity signed a petition upon the promise of another to relieve him from the burden of the assessment, required the commissioners to adjudge that a fraud upon the law was intended, and thereupon to reject the petitioner's name, in determining whether or not a majority of resident land-owners whose lands were reported as benefited, were in favor of the improvement." So, in *Million* v. *Board, etc.*, 89 Ind. 5, this court held that the fact that one Bowen, a large land-holder, had signed the petition for a free turnpike, solely upon condition of being released from the payment of the assessment against his land, and that said expense should be borne by the parties and others, even when

the contract was made with the board itself, and when it was necessary that he should sign the petition in order to have the required number to constitute a majority and give the board jurisdiction, did not invalidate the proceedings.

The other errors assigned it is not necessary to consider specially. The result of the action of the court in permitting the plea in abatement, and in overruling the demurrer to it, and in discharging the jury after the trial of the issues had begun, and summoning a new jury to try the issue on the plea in abatement, was that the cause was decided upon a matter entirely aside from its merits, and which had nothing to do with the issues brought up by the appeal for determination. The court erred in overruling the motion for a new trial.

The appellants claim that after the remonstrances of the appellees were withdrawn, the motion of the appellants for judgment in their favor should have been granted, but we think justice will be better secured by a reversal of the judgment and a new trial of the issues as they came from the county board.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to grant a new trial herein as to the issues tried in this cause before the county board.

Filed May 10, 1884.

No. 11,321.

SCHULTZ *v.* THE BOARD OF COMMISSIONERS OF CASS COUNTY.

STATUTE OF LIMITATIONS.—*Overpayment by County Treasurer.—Limitation of Six Years.*—The six years statute of limitations is a good defence, in bar, to an action by a former county treasurer, against the board of commissioners, on account, for money overpaid by him as treasurer, through mistake.

Schultz *v.* The Board of Commissioners of Cass County.

SAME.—*When Statute Begins to Run.*—The statute begins to run in such case from the date of the mistaken overpayment, and not from the discovery thereof.

From the Cass Circuit Court.

Q. A. Myers and *M. Winfield*, for appellant.

D. B. McConnell, R. Magee and *S. T. McConnell*, for appellee.

ELLIOTT, J.—The claim of the appellant is set forth in various forms in his complaint, but it is evident that, although stated in different forms, there is only one claim, and that is for money overpaid by him as county treasurer.

It is quite clear that as to those paragraphs of the complaint which state an ordinary claim not evidenced by a writing, the plea of the six years statute of limitations is a complete bar. It is not necessary to cite authorities in support of the proposition that the statute may be pleaded by any one against whom an ordinary claim, not evidenced by a written instrument, is urged.

It is, however, contended that some of the paragraphs of the complaint show that the money was paid under a mistake and that the statute only begins to run from the time of the discovery of the error. This position can not be maintained. It is true that suits to correct mistakes are not ordinary actions at law, but are matters of equitable cognizance. This, however, proves nothing in support of the appellant's position, even upon the concession that this is simply a suit to correct a mistake, for it is perfectly settled that equity follows the law, and that, in obedience to this principle, courts of chancery enforce statutes of limitations except in peculiar cases of fraud or the like. *Lewis* v. *Marshall*, 1 McLean, 16; *Bank* v. *Daniel*, 12 Peters, 32; *Lansing* v. *Starr*, 2 Johns. Ch. 150; *McCrea* v. *Purmort*, 16 Wend. 460; *Sugar River Bank* v. *Fairbank*, 49 N. H. 131. This general principle was applied in the case of *Bank* v. *Daniel*, *supra*, to an overpayment of money by mistake, the court holding that the cause

of action accrued at the time of the overpayment, and that consequently the statute began to run from that time. There may, perhaps, be cases of peculiar hardship, where courts of equity would not allow the bar of the statute to be interposed, but this certainly is not one of them, for here the treasurer, of all persons in the world, ought to have had full knowledge of the duties of his office, and of the condition of the county finances. If he was ignorant, he can blame no one but himself, and surely can not justly claim that the county, or any one else, deceived or overreached him. No one was in a better situation to become acquainted with all the facts than he, and if he suffered the statute to run the fault was his own. Sound policy requires that county officers should promptly press claims for money alleged to have been overpaid by mistake, and elementary principles require the came conclusion.

A plaintiff's ignorance of the existence of a cause of action does not, as a general rule, prevent the statute from running. This is so even in cases where there is bad faith on the part of the defendant, and, for a much stronger reason, is so where there is a mutual mistake. *Ware* v. *State, ex rel.*, 74 Ind. 181.

In view of the general principles to which we have referred, we feel not the slightest doubt of the soundness of the decision in *Mathesie* v. *Board, etc.*, 82 Ind. 172. That case really rules the present, although a somewhat different line of reasoning was there pursued.

The case to which we have referred answers, and to our minds very satisfactorily answers, the argument of counsel that the act of December 21st, 1879, gives a cause of action for money overpaid by a county treasurer irrespective of the statute of limitations. A statute giving a right of action in general terms can not be regarded as annulling the statute of limitations. Judgment affirmed.

Filed March 29, 1884. Petition for a rehearing overruled May 7, 1884.

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147 680

No. 11,305.

ARMSTRONG *v.* SHORT ET AL.

MISTAKE.—*Misdescription in Mortgage, Foreclosure and Sheriff's Deed.—Lien.*—A description in a mortgage, carried forward into a decree of foreclosure, and recited in a sheriff's deed, reading "the south part," etc., is wholly insufficient; and if, in the foreclosure, no personal judgment be rendered for the mortgage debt, the latter is no lien on such land.

SAME.—*No Reforming Mistake of Law.*—Where such description is not a mistake of fact, *i. e.*, was just as the parties intended it to be, there can be no reformation.

SAME.—*Mistake of Fact.*—Foreclosure and sale of land misdescribed are no bar to a subsequent action for reformation, if the misdescription was a mistake of fact.

From the Lawrence Circuit Court.

G. Putnam, G. W. Friedley, S. D. Luckett and *W. H. Martin*, for appellant.

M. F. Dunn, G. G. Dunn, E. E. Rose and *E. Short*, for appellees.

ZOLLARS, J.—The controlling questions are presented by the assignment of error in overruling appellant's motion for a new trial. The material facts as shown by the evidence are as follows: In 1877, appellee John Short, and his wife, executed to appellant a mortgage upon five different tracts of land, to secure the payment of a note of $1,700, to become due on the 15th day of October, 1880. The interest not having been paid, the mortgage was foreclosed in March, 1880. It was found that $360 was then due, and that the amount of the note, $1,700, would become due at the time fixed in the note, viz.: October 15th, 1880.

The mortgage was foreclosed against all of the defendants, John, Louisa and Emerson Short. The land was ordered sold, without relief from valuation and appraisement laws. It was further ordered, that out of the proceeds of the sale the $360 then due should be first paid. In November, 1880, the lands were sold by the sheriff to appellant for $1,700. He paid the costs, and $1,566, the balance of the bid, was applied

in extinguishment of the amount found due. After the expiration of the year for redemption, appellant received a deed from the sheriff for the lands described in the mortgage, and so purchased by him. One of the tracts of land is described in the mortgage as the south part of the northeast quarter of section thirty, etc., containing seventeen acres. Another is described therein as the north part of the east half of the northwest quarter of section thirty-one, etc., containing forty-five acres. These descriptions of these two tracts extend through the entire proceedings and into the sheriff's deed.

After receiving the sheriff's deed, appellant instituted an action against the mortgagors, John and Louisa Short, to recover the possession of the lands. As to the two tracts, the descriptions of which are above set out, he dismissed his case, and took judgment for, and recovered the possession of, the other tracts.

Subsequently to this, and in February, 1882, John and Louisa, for the nominal sum of $800, conveyed to Emerson Short, by a warranty deed, the two tracts of land above described.

The contest here is about these two tracts, and between appellant and Emerson Short. Appellant's complaint was in three paragraphs. One sets up the note and mortgage, and the insufficient description of these two tracts, and asks a reformation and foreclosure of the mortgage as to the two tracts. Another sets up the foreclosure proceedings, and asks that the unpaid portion of the amount found by the decree, be declared a lien upon, and enforced against, said two tracts. A third sets up the foreclosure proceedings, and with various averments asks for a recovery of the possession of said tracts from appellees. Answers were filed by appellees, and a cross complaint by appellee Emerson Short.

Upon the trial below, the court found against appellant, and quieted the title to the two tracts in appellee Emerson Short.

In addition to the evidence above set out, there was the testimony of appellant and Emerson Short. Short testified as

follows: "At the time I took those deeds, I knew about the mortgage to plaintiff by John Short and Louisa Short, his wife, and I knew that it was the intention of the parties to embrace said two tracts of land in said mortgage, by the description set out in the mortgage. I had heard that plaintiff said the descriptions were good descriptions." Appellant testified that the descriptions of the two tracts in the mortgage were correct; that he had known the tracts by the descriptions in the mortgage for a long time, and could identify the lands meant by them; that it was generally known in the neighborhood of the lands what tracts were meant by these descriptions; that it was the intention of the parties to the mortgage to mortgage the two tracts. On cross-examination, he testified as follows: "I knew at the time I accepted the mortgage the descriptions that were in the mortgage; thought they were good descriptions, and I believe yet they are good descriptions."

It is very clear from appellant's testimony that there was no mistake of fact as to the descriptions; they are just what he understood and knew them to be, and, apparently, just what he wished them to be. If he is not able to recover anything by them, it is not because there was any mistake in the insertion of them in the mortgage, but because he misconceived the legal effect and import of them. It is just as clear that the descriptions are entirely defective and insufficient. *Gigos* v. *Cochran*, 54 Ind. 593; *Shoemaker* v. *McMonigle*, 86 Ind. 421; *Hammond* v. *Stoy*, 85 Ind. 457; *Buck* v. *Axt*, 85 Ind. 512; *Lewis* v. *Owen*, 64 Ind. 446. Upon the authority of our cases, it is also clear that there can be no reformation of the mortgage, because the mistake is not one of fact, but of law.

In the case of *First Nat'l Bank of Centreville* v. *Gough*, 61 Ind. 147, in which a reformation and foreclosure of a mortgage were asked, the court said: "The mortgage was thereupon drawn up by a scrivener, as appears, in the presence of the parties. No formulated description of the property, to be inserted in the mortgage, had been agreed upon by the parties or prepared for the scrivener to copy. He, as we must pre-

sume, by their direction, incorporated the following into the mortgage, viz.: 'West middle division of S. E. quarter of section 21, township 16, range 12, containing 95 acres.' There does not appear to have been any fraud, surprise or mistake in copying the description. The parties, in preparing the mortgage, did just what they intended to do. * * * The mistake, it thus appears, in the preparation of the mortgage, was one of law, arising from the negligence of the parties in failing to acquire information as to the requisite description of the land to be inserted in the mortgage. They inserted a description such as they approved, but two years afterward found it was not full enough to identify the land, and now pray the court to insert for them such an addition as will effect such identification," etc.

In the case of *Toops* v. *Snyder*, 70 Ind. 554, it was averred that the deed contained the words "also two and two-thirds acres" off the east side, etc., when it should have contained the words "also one and twenty-hundredths acres," instead of the words "two and two-thirds acres." This court said: "It appeared from the evidence of each of the said parties, that each of them could read and write, and that their partition deeds were read to them before they executed the deeds. It is very clear from their testimony, we think, that they did not mistake the contents of the deeds, but only the effect of such contents; and that the misdescription of the lands intended to be conveyed, in each of said deeds, was the result, not of the mistake of the parties, but of their carelessness in not procuring, as they might have done, correct descriptions of the lands, before they executed their deeds. * * It is very clear, also, from the evidence in the record, that the alleged mistake in the deed from Joseph Toops to Amos Heavilon is a mistake, from the effects of which the cross complainants can obtain no relief in a court of equity. Heavilon testified as a witness on the trial of the case as follows: 'I examined Joseph's deed to me, and knew what was in it before I accepted it.' It is manifest from this evidence, that, if there was

any mistake in Heavilon's deed, it was a mistake only as to its effect, and not as to its contents; and against such a mistake, as we have seen, equity affords no relief."

In the case of *Craven* v. *Butterfield*, 80 Ind. 503, the description in the mortgage was, "Twenty-seven acres, fractional section fifteen (15), town. eight (8) south, of range eleven (11) west." It was held that the mortgage was void for the want of certainty in the description of the land, and that it could not be reformed.

See, also, *Nelson* v. *Davis*, 40 Ind. 366. In this case it was said: "The instrument speaks, for aught that appears, just as the parties desired that it should. The mistake, then, if any was made, was a mistake of law as to the legal effect of the deed as executed."

In the case of *Easter* v. *Severin*, 78 Ind. 540, the real estate was described in the mortgage as "Three town lots in the town of Benwood, aforesaid, being all the town lots owned by said Adam Starr in said town." The court said: "In the case at bar, it is not pretended or claimed in the amended complaint, that all the parties to the mortgage in suit did not know, at the time of its execution, the exact language used therein. * * * The mistake stated in the amended complaint can not be regarded, therefore, as a mistake as to any matter of fact, but only as to the legal effect of the language used in the mortgage. We do not understand it to be the province of a court of equity, or that it has the power, to relieve parties from the effects of such a mistake," etc. See, also, *Baldwin* v. *Kerlin*, 46 Ind. 426; *Nicholson* v. *Caress*, 59 Ind. 39; *Allen* v. *Anderson*, 44 Ind. 395; *Heavenridge* v. *Mondy*, 49 Ind. 434.

In the case under examination, the mistake being one of law and not of fact, the mortgage can not be reformed. The descriptions of the two tracts of land, in dispute, in the mortgage, the foreclosure proceedings, and the sheriff's deed to appellant, are so defective and uncertain, that he neither acquired a lien by the mortgage, nor title by the deed.

The court below, therefore, was not in error in finding against appellant, and quieting the title in Emerson Short. If the appellant had recovered a personal judgment in the foreclosure proceedings, that judgment might be enforced against the land. But he recovered no such judgment. It is not necessary, but, in view of the pleadings and the evidence, it is proper to say that the foreclosure of a mortgage, and the purchase of the land by the mortgagee from the sheriff, will not bar a reformation and foreclosure of the same mortgage, where the description of the land in the mortgage, and subsequent proceedings, are so defective that no title passes by such sale, when the defective description is a mistake of fact, and not of law merely. *Conyers* v. *Mericles*, 75 Ind. 443.

The fact that the land may have been generally known by the erroneous description, might be important in an action to correct the mistake, and reform the mortgage, but that fact of itself will not cure such defect, or support an action for the possession of the land, without such reformation.

We may say further, that where a mortgage has been foreclosed and the property sold, there can be no reformation of the sheriff's deed in the way of correcting an erroneous description. *Miller* v. *Kolb*, 47 Ind. 220; *Keepfer* v. *Force*, 86 Ind. 81.

What has been said disposes of the case on its merits. It is not necessary, therefore, to consider the several questions sought to be presented by the rulings upon the pleadings. We may say, however, that it results from what we have said that the court below did not err in sustaining the demurrer to the third paragraph of the complaint, nor in overruling appellant's demurrer to the fourth and fifth paragraphs of the answer by Emerson Short. And while the second and third paragraphs of the answer by John and Louisa Short were not sufficient, and the demurrer to them might properly have been sustained, the error in this case was a harmless one.

The judgment is affirmed with costs.

Filed May 10, 1884.

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No. 11,110.

WRIGHT ET AL. *v.* MACK ET AL.

VOLUNTARY ASSIGNMENT.—*Refusal of Trustee to Sue.—Collusion.—Assignor and Trustee.—Creditors.—Joinder.*—Where, under a voluntary assignment by an embarrassed or failing debtor of all his property, in trust for the benefit of all his *bona fide* creditors, a cause of action accrues to the trustee, of or concerning the trust estate, which he wrongfully refuses to enforce by suit, or where there is apparent collusion between such assignor and his trustee, by means of which the trust property is wasted or sacrificed, the creditors of the assignor, as the beneficiaries of the trust, may sue in their own names, and, having a unity in interest in the object of the suit, they may join in the same complaint and maintain a joint action.

SAME.—*Embarrassed or Failing Debtor.—Preferred Creditor.—Chattel Mortgages.—Wrongful Conversion of Trust Property.—Collusion between Assignor, Trustee and Mortgagees.—General Creditors.*—An embarrassed or failing debtor, before the execution of a voluntary assignment of *all* his property in trust for the benefit of *all* his *bona fide* creditors, may lawfully mortgage his property to secure his valid and subsisting debts to some of his creditors, in preference to his other creditors. But where, in such case, after the execution of his voluntary assignment, the acts of the assignor and his mortgagees, in collusion with his trustee, are such as show the wrongful conversion of the trust property from the purposes of the trust, they and each of them will be liable to the general creditors, as beneficiaries in the trust, for their damages resulting from such conversion.

PERSONAL PROPERTY.—*Sale on Execution.—Subject to View.—Lots and Parcels.*—Under section 751, R. S. 1881, personal property can not be sold on execution, unless it is present and subject to the view of those attending the sale, and it must be sold at public auction, in such lots and parcels as are calculated to bring the highest price.

SERVICE OF SUMMONS.—*Sheriff's Return.—Default.*—Where the sheriff's return to the writ of summons fails to show that it has been served on the defendant, or, under section 309, R. S. 1881, upon some one as the agent of the defendant, the plaintiffs are not entitled to a default against such defendant.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

H. C. Dodge and *O. Z. Hubbell*, for appellees.

HOWK, C. J.—In this case the appellants, the plaintiffs be-

low, have assigned here as errors the following decisions of the circuit court:

1. In sustaiuing the demurrers of the appellees, except Eva Mack, to the complaint of the appellants; and,

2. In overruling their motion to default the appellee Eva Mack.

In their complaint the appellants alleged the following facts:

"1st. That on the 14th day of November, 1882, the defendant Michael K. Weaver, being a merchant engaged in the drug business at the city of Elkhart, in said county, and being in failing circumstances, made an assignment in due form, under the voluntary assignment statutes of this State, of all his property to the defendant John M. Minnich, for the benefit of all his creditors, and that said Minnich at once qualified as such assignee, and entered on the duties of said trust and is still so acting.

"2d. That at the time said assignment was made these plaintiffs were, and still are, creditors of said Michael K. Weaver, severally, for the respective sums set opposite their names in the caption of this complaint.

"3d. That twelve days before said assignment was made said Weaver mortgaged, by several separate mortgages, all his property, consisting of drugs, medicines, paints, oils, varnishes, furniture and store fixtures, to said defendants, Mack (his sister), Dodge (his attorney) and Kilmer (his uncle), to secure the aggregate sum of about $1,400, and said mortgages were at once duly recorded, so as to make an apparent lien upon said property.

"4th. That shortly after said assignment was perfected said mortgagees commenced foreclosure proceedings on said mortgages in this court, making said Weaver and Minnich sole defendants, who voluntarily appeared without service of process and allowed foreclosures to be taken on each of said mortgages for an aggregate amount of about $1,400.

"5th. That said mortgagees caused orders of sale to be is-

sued upon said decrees, and caused said goods to be sold thereon on the 14th day of January, 1883.

"6th. That at the time of said sale said goods remained in the store of said Weaver, No. 97 Main street, at Elkhart, Indiana, the same as when the assignment was made; that said goods were appraised under the assignment in accordance with the statute, at the sum of $5,700, and they were worth that sum at the time of said sheriff's sale; that said Minnich, although at his son's store in the same block, was not present at the sale; that several hundred dollars' worth of said goods at the time of sale were in the basement cellar of said store, and not present in the store where said sale was made, and were not subject to the view of those attending said sale; that said sheriff, by the express command of said Mack, Dodge and Kilmer, then and there given, announced that he would offer all the goods covered by said mortgage in bulk; these plaintiffs, by their agents, then requested said sheriff to offer said goods in parcels, and said agent then announced that he would bid on the iron safe and show-cases, and on everything else that would sell cheap enough; but said sheriff, acting under said command, refused to offer said goods in parcels; thereupon said Dodge, for himself and as attorney for said Mack and Kilmer, announced that one barrel of alcohol, one barrel of linseed oil, three show-cases, and all goods held on commission would be excepted from said sale; and thereupon said sheriff repeated said announcement, and then offered the balance of said goods for sale as an entirety, and said Dodge, for said Mack, bid therefor the sum of $1,000, and there being no second or other bid (although more than twenty persons were present and intending to bid), said property was sold to said Eva Mack for $1,000.

"7th. That it was stated by no one what particular barrel of alcohol or oil out of several in the store, nor which three out of the five show-cases, nor what or how much goods were held on commission and excepted from said sale; nor was the

fact announced that a large part of the goods offered for sale were in the cellar and out of view; nor did any of the bidders present know any of those facts except said Mack, Dodge and Kilmer.

"8th. That said goods were sold in the manner aforesaid by said Mack, Dodge and Kilmer, for the purpose of stifling all competition, and thereby getting the goods at one-sixth their value for the benefit of themselves and said Weaver.

"9th. That said Eva Mack, by virtue of such pretended sale, at once took possession of said goods of the value of $5,700, and paid off said Dodge and Kilmer, and placed said Weaver (her brother) in possession of said store and goods, ostensibly as her agent, to buy and sell as usual; and said Mack at once took possession and assumed ownership of said goods, and has since been selling at retail the same as if she owned said goods, and she at once returned to her home in Dakota Territory.

"10th. That outside of the goods so converted by Mack, Dodge and Kilmer, there will not be enough of assets to pay the expenses of the assignments.

"11th. That these plaintiffs at once notified said Minnich of all the facts heretofore detailed, and requested him to bring suit for the value of said goods, which he refused to do. They also requested permission to bring suit for him in his name as assignee, and offered to indemnify him against all attorney's fees, costs, damages and expenses, but after consultation with said Dodge, who was acting as his legal adviser and attorney, and also as the attorney for said Mack, Kilmer and Weaver, he refused to allow these plaintiffs so to carry on suit in his name, and, therefore, he is made a defendant.

"12th. The plaintiffs bring this suit on behalf of themselves and of all the other creditors of said Michael K. Weaver who may wish to join herein.

"13th. The plaintiffs pray for a decree and judgment for $6,000 against said Mack, Dodge and Kilmer, and an alter-

native judgment for $6,000 against said Minnich in case a judgment can not be had against or be collected of said Mack, Dodge or Kilmer, and a decree that the amount realized be paid to the assignee of said Weaver to be distributed according to law."

To the foregoing complaint the appellees Kilmer, Dodge, Weaver and Minnich severally demurred upon the ground that it did not state facts sufficient to constitute a cause of action "against each of them separately." This demurrer was sustained by the court, and the appellants excepted, and, declining to amend or plead further, judgment was rendered against them for appellees' costs.

The first question discussed by the appellants' counsel, in his brief of this cause, is thus stated: "Can the creditors of Weaver maintain this suit?" There can be no doubt, we think, that if the appellee Minnich could have maintained an action against his co-appellees, or any of them, upon or by reason of the facts stated in the complaint, the appellants as creditors of the appellee Weaver, upon the showing made in the *eleventh* clause of the complaint, could maintain the same or a similar action. Under Weaver's voluntary assignment of all his property for the benefit of all his creditors, the appellee Minnich, as assignee, became the trustee of a trust, of which the appellants and other creditors of Weaver were the beneficiaries. If a cause of action accrue to the trustee, of and concerning the trust estate, which he wrongfully refuses to enforce by suit, or if the facts charged show collusion between the insolvent assignor and his trustee, by means of which the trust property is wasted or sacrificed; in either case, as it seems to us, the creditors of the assignor, as the beneficiaries of the trust, may sue in their own names. Thus, in Story's Equity Pleadings, section 516, it is said: "Where a person has become a bankrupt, and assignees are appointed, neither he, nor any of the creditors can ordinarily maintain a suit against any debtor to his estate, or to reduce any of his property into possession; for the right belongs to the as-

signees. But if the assignees should collude with the other party; or should refuse to bring a suit for the benefit of the bankrupt and of his estate, then, in such case, the bankrupt, or any creditor may do so." See, also, on this subject, Story Eq. Pl., sections 178, 227, 514 and 515.

Under the decisions of this court, the creditors of Weaver, having a unity in interest as to the object to be attained by the suit, might properly join in the same complaint and maintain their action together. *Robbins* v. *Sand Creek Turnpike Co.*, 34 Ind. 461; *Strong* v. *Taylor School Township*, 79 Ind. 208.

But the controlling question, in this case, is this: Does the complaint state facts sufficient to constitute a cause of action in favor of the appellants and against the appellees? We are of opinion, that this question must be answered in the affirmative. It will be seen from the complaint, that Weaver was a merchant in failing or embarrassed circumstances; that only twelve days prior to the execution of his voluntary assignment, chattel mortgages were given by him upon all his property and stock in trade, of the alleged value of $5,700, to secure the sums, in the aggregate, of $1,400; and that these mortgages were thus executed by Weaver, one to his sister, Eva Mack, one to his uncle, Kilmer, and the other to his attorney, Dodge. Of course, under the law of this State, Weaver had the right to execute these mortgages, and the mortgagees had the right to accept them, notwithstanding the fact that he was then in failing circumstances, and even if the mortgagees had knowledge of such fact. If the mortgage debts were valid and subsisting debts of Weaver, and their validity is not called in question by the averments of the complaint, he had the right to secure those debts, to the exclusion or in preference of his other creditors, and the mortgagees might lawfully accept such securities. But, conceding this to be true, we are of opinion that the subsequent acts of the mortgagor and mortgagees, and of the trustee Minnich, under the voluntary assignment, in relation to the trust

property, as alleged in the complaint, were such as to subject them and each of them, as well as the assignor, to liability in damages as and for the wrongful conversion of the trust estate, in favor of all the beneficiaries in such trust. The voluntary assignment by Weaver of all his property to Minnich, upon its face at least, was executed by the assignor for the benefit of all his creditors. But when it is construed in connection with the other facts alleged, precedent and subsequent, it is difficult, if not impossible, to avoid the conclusion that the voluntary assignment was in fact executed, not for the benefit of Weaver's creditors, but for the purpose of saving and securing to him or for his use, under the forms of law, all the assigned property free from the claims of his general creditors.

As the facts are stated in the complaint, and admitted to be true as the case is now presented, the execution of the chattel mortgages by Weaver to his sister, his uncle and his attorney, his voluntary assignment, a few days afterwards, of all his property to Minnick, nominally, at least, for the benefit of all his creditors, the foreclosure of the chattel mortgages, shortly after the assignment, upon the voluntary appearance, without process, of Weaver and Minnich, the issue of orders of sale upon the foreclosure judgments, the sheriff's sale of the trust property, as an entirety and not in parcels, upon the commands of the sister, the uncle and the attorney of the assignor Weaver, in the absence of and without objection from the trustee Minnich, but in denial of the request of the appellants, beneficiaries in the trust, for a sale of the goods in parcels, the sale of such goods as an entirety, for but little more than the one-sixth part of their appraised value, to the sister of the assignor, and the failure and refusal of the trustee Minnich, upon consultation with his attorney and legal adviser, who was the attorney also of the assignor and the mortgagees, to take any legal steps in the interest of the appellants, who were beneficiaries in the trust, or even to

allow them to use his name, as trustee, in bringing suit, when they offered to indemnify him against all attorneys' fees, costs, damages and expenses; each and all of these facts seem to constitute parts merely of a single scheme or transaction, wherein each of the appellees performed his or her assigned part. The object and purpose of this scheme or transaction, as shown by the averments of the complaint, seem to have been the wrongful conversion of the trust property from the purposes of trust, and the saving and securing of such property free from the claims and demands of the general creditors of Weaver. The complaint clearly shows, as we construe its allegations, the collusion of the appellees in the accomplishment of such object and purpose.

In section 751, R. S. 1881, it is provided as follows: "Personal property shall not be sold unless the same shall be present and subject to the view of those attending the sale; and it shall be sold at public auction, in such lots and parcels as shall be calculated to bring the highest price."

Applying this section of the statute to the averments of the complaint under consideration, it is very clear that the sheriff's sale of the trust property to Eva Mack was invalid and void. Thus, in *Murphy* v. *Hill*, 77 Ind. 129, in speaking of a sheriff's sale of personal property, this court said: "The fact that the property was not present at the place of sale was of itself sufficient to invalidate the sale. The statute expressly requires that personal property shall not be sold unless it is present and subject to the view of those who attend the sale. 2 R. S. 1876, p. 218, section 469; *Gaskill* v. *Aldrich*, 41 Ind. 338. This was the rule at common law. Freeman Executions, section 290."

Our conclusion is that the appellants stated a cause of action against the appellees in their complaint, and that the demurrer thereto ought to have been overruled.

The second error assigned presents the question, whether or not the appellants were entitled to a default against the

appellee Eva Mack? Of course, the answer to this question depends upon the answer which must be given to the further question, whether or not the record shows any valid or legal service of process in this cause on Eva Mack? If the record shows such service of process on her, the appellants were entitled to have her defaulted; but if it fails to show any such service of process on her, no default could be entered against her. The summons in the case was returned as to her by the proper sheriff, over his signature, as follows: "The within named Eva Mack not found in my bailiwick." Immediately following this return, there appears in the record a certificate, also signed by the proper sheriff, as follows: "I hereby certify, that said Weaver above named as served was at said time the agent and clerk of said Mack, in charge of her store at No. 97 Main street, Elkhart, Indiana, and the said Eva Mack was and is a non-resident of Indiana."

Conceding that this certificate constituted a part of the sheriff's return to the summons in this case, it seems clear to us that this return wholly fails to show any valid or legal service of the summons on Eva Mack, or on Weaver as the agent or clerk of Eva Mack, under the provisions of section 309, R. S. 1881. Weaver was a defendant in this suit, and the service of the summons as to him, referred to in the sheriff's certificate, was the service on him as such defendant, and not as the clerk or agent of Eva Mack. The court did not err, therefore, in refusing to enter a default against Eva Mack.

The judgment is reversed with costs, and the cause remanded with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

Filed March 6, 1884. Petition for a rehearing overruled April 25, 1884.

No. 11,087.

RHOADS *v.* JONES ET AL.

CONTRACT FOR BOND.—*Performance.—If Bond Adjudged Void, no Action on Contract.*—Where an indemnity bond, executed in performance of a preliminary contract for its execution, has been duly adjudged void, no subsequent action can, as a general rule, be maintained on either the bond or the contract.

From the Montgomery Circuit Court.

G. W. Paul and *J. E. Humphries*, for appellant.

B. T. Ristine, T. H. Ristine, H. H. Ristine, P. S. Kennedy and *S. C. Kennedy*, for appellees.

ELLIOTT, J.—It is alleged by the appellant in his complaint, that Isaac Castor, deceased, devised to him certain property, upon condition that he should maintain and care for Indiana Castor, a person of unsound mind, and that this burden is charged upon the property; that an action was brought by the appellees to set aside Isaac Castor's will, and that an agreement of compromise was entered into, wherein it was stipulated, among other things, that the appellant should be released from the burden, imposed by the will, of maintaining Indiana Castor, and that a bond should be executed to that effect; that afterwards a bond was executed by the appellees Jonas A. Jones, Absalom Elmore, S. W. Castor and Asa Ditmore, wherein reference was made to the provisions of the will and to the agreement of compromise, and it was therein provided, that, "Now, therefore, in order to perform said agreement and for the consideration therein named, we do jointly and severally acknowledge ourselves bound unto the said Daniel Rhoads, in the penal sum of $3,000, well and truly to be paid if said Daniel Rhoads shall in any way be injured or damaged by reason of any claim or demand, or suit at law instituted by or in behalf of said Indiana Castor, by reason of any claim made by her as legatee under the will aforesaid. If we fail to release, or cause said Daniel Rhoads to be released and held harmless from all his

obligations under said will for the care of said Indiana Castor, if said conditions be not fully performed on demand made on either of these parties by Daniel Rhoads or his legal representatives, then the above bond shall be absolute and a cause of action accrue thereon." There is some obscurity in the language of the instrument, but we think it discloses an undertaking to relieve appellant from the burden of maintaining Indiana Castor. The breach of the bond is thus alleged: "That defendants only kept Indiana Castor a short time and then refused to care for her and she came back upon plaintiff, and he has supported her since the 1st day of January, 1879." This would, no doubt, be a good assignment of a breach, but it is followed by an allegation that he brought an action upon the bond and it was adjudged void.

The adjudication on the bond unquestionably ends the right of action upon it, and the complaint, therefore, shows no right to recover upon that instrument. It is perfectly evident that a complaint on a bond shown to have been held void in an action between the same parties can not be good. The statement that the bond was declared void demolishes all that part of the pleading which counts on the bond.

After showing the facts to which we have referred, the complaint proceeds: "The defendants did not secure plaintiff by bond from the care of Indiana Castor, that the instrument set out is all the bond that was ever made and the court held it void, and no legal bond has been given to the plaintiff;" that he has demanded to be released from the burden of maintaining Indiana Castor, but that the defendants have failed to release him, and that he has fully performed all of the conditions of the contract on his part.

The complaint shows that the bond called for by the contract was executed, and thus shows a performance. If a party undertakes to execute a bond and does execute one which is accepted by the obligee, there is certainly a compliance with the contract, and it is axiomatic that where there is performance there can be no breach. It therefore appears on the

face of the appellant's complaint that there was, *prima facie*, at least, full performance, and, this appearing, there is no cause of action, unless the *prima facie* case is overturned.

The attempt to show that there was no performance because the bond was void is futile. The judgment of the court as to the invalidity of the bond is conclusive, but we can not discover any reason why this result authorizes the appellant to fall back upon the original agreement. If the bond is void because it is an agreement absolving the appellant from the duty imposed by the will, then the verbal agreement must also be null; so that if this was the basis of the judgment it must necessarily conclude appellant, and for this reason it covers and takes in the whole cause of action. One who receives a full and complete obligation pursuant to the terms of a preliminary agreement is not remitted to the original agreement because the last agreement is adjudged void, unless, at least, he states affirmatively some reason showing that the last agreement was not such as the first contract called for; and for aught that appears in the present complaint, the invalidity of the bond may have arisen from some act performed subsequent to its execution. It is evident in this case that the only claim that the appellant can possibly have is that founded upon the agreement to maintain Indiana Castor, and on that agreement judgment has been pronounced against him; and, in order to show that this judgment is not conclusive upon the whole subject, he must state some fact, or facts, showing why the delivery of the bond was not a performance of his contract, and why it did not merge the preliminary agreement.

It is established law that where a contract is executed pursuant to a preliminary agreement, providing for its execution, the right of action is on the contract last executed. The first contract, and all negotiations, oral or written, are merged in the last instrument, which is deemed the expression of the contract finally agreed upon. Many authorities are collected in *Phillbrook* v. *Emswiler*, 92 Ind. 590, where this point is expressly decided. We declare the complaint before us bad, be-

cause, having shown a preliminary contract and the performance of its conditions by the execution of the bond provided for, there is no sufficient statement developing the cause of the invalidity of the instrument. It is true that the complaint does show that Indiana Castor was of unsound mind, but it does not show that it was for this reason that the bond was adjudged void, so that if counsel were right (which we do not decide) in their contention that this bond is void, still the complaint fails to impeach the performance.

It is difficult to see how the bond can be void for the reason assigned by counsel and the preliminary contract be valid. The sword of counsel's argument cuts both ways. If the bond is void, so, also, is the condition of the preliminary agreement, and, therefore, no action can be maintained upon it. Whether the contract of compromise can be avoided is not for us to now decide, for the question is not in the case. But taking counsel's argument as sound, the conclusion to which it irresistibly leads is, that the agreement in the preliminary instrument relieving him from the burden imposed by the will is also void. If the condition is not good in the bond executed in performance of the contract, it can not be good in the original condition, and if this be so, then no recovery can be had on the original contract.

A well settled rule of pleading is that a complaint must proceed on a definite theory, and be good on that theory or it can not be good at all. *Mescall* v. *Tully*, 91 Ind. 96, and authorities cited. The complaint can not be good unless the contract on which it is founded is valid, and, if the appellant's counsel are right, the insanity of Indiana Castor makes both the bond and the preliminary contract void, and on the prongs of their own argument they are impaled.

Judgment affirmed, for the reason that the complaint is bad. On this point rests our judgment.

Filed April 1, 1884. Petition for a rehearing overruled May 7, 1884.

No. 11,138.

The Louisville, New Albany and Chicago Railway Company *v.* Zink et al.

From the Washington Circuit Court.

D. M. Alspaugh and *J. C. Lawler*, for appellant.

S. B. Voyles and *H. Morris*, for appellees.

Hammond, J.—This was an action by the appellees to recover for the value of a cow alleged to have been killed on the appellant's railroad at a place where it was not securely fenced. The finding and judgment were for the appellees.

The only question made upon the record in this court is whether the railroad was securely fenced at the place in controversy.

The appellees' lot, from which the cow escaped, was on the north side of, and twenty or twenty-five feet from, the railroad track. A gate on the south side of the lot had blown, or been left, open, and through this the cow passed out, entered upon the railroad track, and was killed during the night by a train of cars, about one-fourth of a mile east of the lot. It was not shown whether the fence on the south side of the enclosure came up to the appellant's right of way or not; nor was it shown that such fence formed any part of a line of fence intended or used for the protection of the railroad from trespassing animals. The evidence tended to show that the railroad was not fenced on the south side opposite to the appellees' enclosure, or to the place where the cow was killed.

We are unable to say, from the evidence, that the court below erred in its finding.

Judgment affirmed, with costs.

Filed May 10, 1884.

No. 10,240.

ZOTTER ET AL. *v.* LAWRENCE.

From the Kosciusko Circuit Court.

C. Clemans, for appellants.

C. Cowgill, *C. E. Cowgill* and *H. B. Shively*, for appellee.

FRANKLIN, C.—Appellee sued appellants upon four several promissory notes. Answers and replies were filed, issues were formed, and a trial by the court had, finding for the plaintiff, and judgment rendered for $1,200.

No question was raised upon the pleadings, nor motion made for a new trial in the court below, and the record shows that the finding of the court was made by agreement.

The error assigned is that neither paragraph of the complaint states facts sufficient to constitute a cause of action.

The objections made to each paragraph of the complaint are, that neither of them shows how the notes were owned and held by the plaintiff, he being assignee; and that the plaintiff could only recover six instead of ten per cent. interest. Neither of these objections has any foundation. Each paragraph of the complaint shows that each note was transferred to the plaintiff by the endorsement on the back thereof of the name of the payee, and each note provided for the payment of ten per cent. interest. But the latter question can not be raised by objecting to the sufficiency of the complaint. Each paragraph of the complaint would have been good on demurrer, and is clearly not liable to objections raised for the first time in this court.

We see no merit in this appeal. The notes were executed in 1875; this suit was commenced in 1880; the appellants have unreasonably delayed payment of the debt. The judgment ought to be affirmed, with ten per cent. damages.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with ten per cent. damages, and with costs.

Filed May 10, 1884.

No. 11,327.

95	347
146	597
95	347
167	647

WILLIAMS *v.* OSBORNE, ADMINISTRATOR.

FRAUDULENT CONVEYANCE.—*Action to Set Aside.—Amount Exempt from Execution.*—A voluntary conveyance may be avoided by creditors upon allegation and proof that the debtor, at the time he made the conveyance, had no other property than that which he could claim as exempt from execution.

PRACTICE.—*Defect in Special Finding.—Venire De Novo.—Exception.*—A defect in a special finding can be reached by a motion for a *venire de novo*, but not by an exception to the conclusions of law.

From the Warren Circuit Court.

C. V. McAdams, for appellant.

J. G. Pearson, for appellee.

ELLIOTT, J.—The questions argued by counsel are presented by the special finding of facts and the conclusions of law stated by the court on the facts.

The court found the facts to be substantially as follows: David Williams, then in life, was, on the 19th day of December, 1881, the owner of a tract of land; for the purpose of defrauding his creditors, he conveyed it to John W. Williams, by whom it was conveyed to the appellant; both of these persons had knowledge of the fraudulent purpose of David Williams, and both conveyances were voluntary. At the time the conveyances were made, David Williams had $300 worth of property, and no more, which he claimed as exempt from execution, and had at no time thereafter any greater amount of property. No assets of any description came to the hands of the administrator. At the time the first conveyance was executed, the decedent was indebted to divers persons whose claims have been allowed against his estate.

We are clear that the facts warranted the conclusions of law stated by the court against the appellant.

A voluntary conveyance is fraudulent as against existing creditors when the grantor has no other property subject to execution. Our cases establish the law to be that a voluntary conveyance may be avoided by creditors, upon proof that

the debtor had no other property subject to execution at the time the conveyance was made and the suit instituted. The general rule is thus stated in *Campbell* v. *Gould*, 17 Ind. 133: "Although it may be said, perhaps, that the debtor must claim the exemption, avail himself of this right, and that he may by express acts, or even implication, waive it; yet we can not perceive but that the property, when within the exemption, should be *prima facie*, for the purposes of a suit of this character, considered as beyond the reach of the regular process of the court. In other words, keeping in view the fundamental law, and the statute, the legal presumption would be, that there was a necessity for such laws, and that the citizen would avail himself of the privilege thereby extended to him, to reserve the amount of property indicated, for the purpose named." This principle has been applied in a variety of cases. *Bozell* v. *Hauser*, 9 Ind. 522; *Williams* v. *Osbon*, 75 Ind. 280; *Dick* v. *Hitt*, 82 Ind. 92; *Iles* v. *Watson*, 76 Ind. 359, auth. p. 361; *Hubler* v. *Taylor*, 20 Ind. 446; *Simpkins* v. *Smith*, 94 Ind. 470.

Where a special finding is deemed indefinite or defective in its statements, the proper practice is to move for a *venire de novo*. Faults of this character can not be reached by excepting to the conclusions of law stated by the court.

Where the findings are not supported by the evidence, the appropriate proceeding is a motion for a new trial.

It is not necessary that all the allegations of a complaint should be proved, for the rudimentary rule is that it is sufficient if the substance of the issue be proved. It was not necessary for the appellee to prove that the decedent had no property at all, for the substance of the issue was proved when it was made to appear that he had no property subject to execution. As it was not necessary to prove more than the substance of the issue, it follows that it was not necessary to embody more than that in the special finding.

Judgment affirmed.

Filed May 13, 1884.

No. 10,654.

LYTTON *v.* BAIRD.

95 349
138 158
95 349
140 70
95 349
142 406
152 186
95 349
155 60

INSTRUCTIONS.—Though a single instruction taken alone might be erroneous, yet, if all relating to the subject, when taken together, expresses the law correctly, there is no available error.

MALICIOUS PROSECUTION.— *Probable Cause.*—The existence of probable cause for a criminal prosecution does not depend upon the guilt of the accused.

SAME.—*Instructions.*—To a suit on a note it was pleaded that the execution of the note was procured at W. by certain false statements, and issue was formed thereon. A witness on the trial was indicted for perjury, and, being discharged, sued for malicious prosecution, and upon that trial the court instructed that on the trial of the suit on the note, the place of its execution was not a material matter.

Held, that the instruction was correct.

SAME.—*Probable Cause, Mixed Question of Law and Facts.*—The question of probable cause is a question of law, where the facts touching it are not disputed; but if the facts be in question, then it is a mixed question of law and fact, to be left to the jury under proper instructions.

SAME.—*Exemplary Damages.*—Exemplary damages may be given in an action for malicious prosecution.

SAME.—*Measure of Damages.— Instruction.— Evidence.— Harmless Error.*—Where the complaint in a suit for malicious prosecution claimed special damages only for the expenses of his defence, it is error to instruct that he is entitled to compensation for "expenses and *losses* sustained by reason of the prosecution;" but if there be no evidence of expenses and losses sustained except in preparing his defence, the error is harmless, as against the defendant.

SAME.—*Judgment.*—The record of the criminal case upon which the suit for malicious prosecution was founded was in evidence, and showed a judgment in these words: "The defendant moves to quash the indictment herein, which motion the court sustains, and said defendant is discharged."

Held, that this, though informal, was a good judgment, ending the prosecution and discharging the defendant.

Held, also, that it was error to refuse to instruct that without proof that the criminal prosecution had terminated in the plaintiff's favor, he could not recover, but the error was harmless in view of the record evidence, which was conclusive proof of the fact.

SAME.—*Advice of Counsel.—Evidence of Malice.*—If a party, upon a full statement of the facts within his knowledge, and for an honest purpose, acts upon the advice of counsel in procuring a criminal prosecution, the fact is evidence to rebut malice and want of probable cause, but it is not conclusive.

Lytton v. Baird.

From the Monroe Circuit Court.

J. F. Pittman, J. R. East, J. H. Louden and *R. W. Miers*, for appellant.

G. W. Grubbs, J. W. Buskirk and *H. C. Duncan*, for appellee.

COLERICK, C.—This was an action for malicious prosecution brought by the appellee against the appellant. The complaint, in substance, averred that, on the 1st day of February, 1881, the appellant maliciously, and without probable cause, procured the grand jury of Monroe county to indict the appellee upon a charge of perjury; that he was arrested and imprisoned, and afterward gave bond for his appearance in the Monroe Circuit Court to answer said charge; that subsequently such proceedings were had in said cause that he was fully and finally discharged from said prosecution; that said charge was wholly false; that he was compelled to expend and become liable for a large amount, to wit: $1,000, in employing counsel and preparing for the defence of the case, and that he was damaged in the sum of $5,000, for which he demanded judgment. To this complaint an answer of general denial was filed, and the issues formed were submitted to a jury for trial, who returned a verdict in favor of the appellee for $1,000. A motion for a new trial was made and overruled, to which ruling the appellant excepted, and thereupon judgment was rendered against him, from which he appeals, and assigns as the only error for the reversal of the judgment the overruling of his motion for a new trial.

The reasons assigned for a new trial were:

1. That the verdict was contrary to law.

2. That the verdict was not sustained by sufficient evidence.

3. That the court erred in giving, on its own motion, instructions numbered from one to twelve, inclusive.

4. That the court erred in refusing to give the special instructions asked by the appellant.

5. That the court erred in admitting certain evidence, recited in the motion.

6. That the damages assessed were excessive.

7. That the court erred in allowing certain evidence, referred to in the motion, to be introduced.

The appellant's counsel, with commendable zeal and ability, review the evidence rendered on the trial, and insist that the judgment should be reversed because of the insufficiency of the evidence to sustain the verdict. We have carefully examined the record, and find that as to every material fact involved in the case opposing evidence was introduced, and that a conflict therein as to each fact exists. Adhering to a long established and inflexible rule of this court, we will not, in view of its conflicting nature, attempt to review the evidence, so as to reconcile, if possible, its conflict, or determine its preponderance, which was peculiarly and properly the province of the jury who tried the case, and who possessed the opportunity and advantage, which we do not enjoy, of seeing the witnesses, and observing their conduct and demeanor while testifying, which so often furnish the safest and most satisfactory means of testing the credibility of the witnesses and determining the weight to be given to their evidence. It is sufficient to say that the evidence strongly tends to sustain all the material facts in the case, and for that reason we can not disturb the verdict on the weight of the evidence.

The third reason assigned for a new trial related to the instructions that were given to the jury by the court on its own motion. The ones criticised and discussed by the appellant are those numbered three, four, five, six, seven, nine and eleven.

The objection presented to the third instruction is, that it misstated the issues to be tried by the jury, in this, that the appellant was not compelled, in order to make his defence available, to prove, as indicated in the instruction, that the appellee was guilty of the crime with which he was charged, but was only required to show that reasonable cause existed

for making the accusation against him. This instruction, considered alone, unaided by other instructions, was erroneous, and unless it can be and is construed with reference to and in connection with other and subsequent instructions upon the same subject that were given by the court, and to which we will hereafter refer, the judgment must be reversed. In the case of *Scotten* v. *Longfellow*, 40 Ind. 23, this court said, "The guilt or innocence of the party charged is not the gist of the action. Probable cause may exist in the absence of guilt. * * The falsity of the charge and probable cause are very different things."

The question of the presence or absence of probable cause does not depend upon the guilt or innocence of the accused, or upon the fact whether or not a crime has been committed. *Hays* v. *Blizzard*, 30 Ind. 457; *Carl* v. *Ayers*, 53 N. Y. 14; *Baldwin* v. *Weed*, 17 Wend. 224; *Bacon* v. *Towne*, 4 Cush. 217; *Thompson* v. *Lumley*, 50 How. Pr. 105; *Moore* v. *Sauborin*, 42 Mo. 490; *Gallaway* v. *Burr*, 32 Mich. 332. Want of probable cause and malice are the issue in the cause, and it makes no difference as to the innocence of the accused. *Skidmore* v. *Bricker*, 77 Ill. 164; *Brennan* v. *Tracy*, 2 Mo. Ap. 540.

But, in this case, the court, in its sixth instruction, stated that although the accused might have been innocent of the offence with which he was charged, "still the defendant in this case would not be liable to the plaintiff for any damages on account of the indictment and prosecution referred to, unless, 1st. He caused and procured it to be instituted. 2d. He did this without probable cause. * * * The plaintiff does not ake out his case by satisfying you that he did not commit the perjury charged; and, further, that he was prosecuted at the procurement of the defendant; he must go further still and show that the defendant did this without probable cause."

In its seventh instruction the court repeated the statement that the plaintiff must show the want of probable cause, which was defined by the court, and in its ninth instruction stated to the jury, if "you determine that he (the defendant) did

cause or procure the indictment to be returned and the prosecution to be instituted, then you will pass to the third and last inquiry, Did he do this without probable cause? If you find that defendant did cause and procure said indictment and prosecution to be instituted, but that he had probable cause to do so, then you should find for the defendant."

We think that the sixth, seventh and ninth instructions, above referred to, are to be considered in connection with the third instruction, to which the objection is made. As stated in *White* v. *Beem*, 80 Ind. 239, "It is settled by repeated decisions that the instructions must be taken as a whole; and if, so taken, they express the law correctly, they will be upheld." See, also, *Branstetter* v. *Dorrough*, 81 Ind. 527; *Walker* v. *Heller*, 73 Ind. 46.

The same objection is urged against the fourth instruction. The observations which we have made as to the third instruction are pertinent, and apply with equal force to this instruction.

The objection presented by the appellant to the fifth instruction is that it stated to the jury that it was immaterial where the note mentioned in the fourth instruction was executed. The fourth and fifth instructions, like others to which we have referred, are to be construed and considered together, as they involve the same subject-matter, and, in fact, constitute a single instruction. The court, after informing the jury that the issue tried in the action upon the note (being the action in which it is said that the appellee, as a witness, committed perjury) was, whether or not Mrs. Lytton was induced to execute the note by fraud or false representations, stated that if the jury found that the appellee on that issue testified falsely, they should find for the appellant; and in that connection the court, in its fifth instruction, stated that "The material matter of inquiry in the former trial was not where the note was executed, but was, Did Mrs. Lavina Lytton in fact execute it in good faith and without fraud or false repre-

sentations? It is not material whether it was done at Dr. Walker's or at Gosport."

To determine the correctness of this instruction, it is necessary to state briefly the facts relating to the execution of the note. It appears, by the evidence, that one Ettie Allen, a daughter of Mrs. Lytton, being indebted to Fahnley & McCrea, made an arrangement with their agent, the appellee, by which she was to execute to them, for their claim, her note, with Mrs. Lytton as surety, which note was executed. Afterwards, in an action which was brought upon the note, Mrs. Lytton filed an answer, averring that the note had been procured from her, at the house of Dr. Walker, by fraud, and recited therein the facts constituting the alleged fraud. On the trial of said action she testified, in substance, that the facts averred in her answer were true, but on the trial of this action she stated that the note was executed by her at the store of Ettie Allen, in Gosport, and not at the house of Dr. Walker, as previously stated by her, and explained her former contradictory statement as to the place of its execution, by saying that she had been induced to so testify by her son (the appellant) and others, who told her that she must do so in order to save her property. The appellee, as a witness in said former action, denied the statement then made by Mrs. Lytton that the note was executed at Dr. Walker's, and asserted that it was executed at the store of Ettie Allen at Gosport, and that no fraud was practiced, or false representations made, to induce her to execute it, and that it was fully explained to and understood by her before and at the time of its execution. It does not appear that on the trial of said former action any evidence, in corroboration of that then rendered by Mrs. Lytton, was introduced. While, on the other hand, it does appear that the evidence of the appellee, then rendered, as to the place where and the circumstances under which the note was executed by her, was corroborated by the evidence of Ettie Allen and Mrs. Steinwalt. The material fact involved and determined in that action, as stated

by the court in its instructions in this case, was not where the note was executed, but was whether its execution by Mrs. Lytton had been procured by fraud and false representations. If it was procured by or through such means, its collection, as to her, could not have been enforced. It could make no material difference whether the fraud was committed at the house of Dr. Walker, or at Gosport, as, in either case, the result, as to the legal effect of the note, and the liability of Mrs. Lytton thereon, would have been the same.

It is insisted that the sixth instruction was erroneous, in not stating that it was necessary for the appellee to prove that the prosecution was caused or procured by the appellant through malice. It is not subject to the objections urged, as it explicitly stated that to entitle the appellee to recover he must establish, by a preponderance of the evidence, certain facts, viz.: That he was falsely and maliciously prosecuted for the crime of perjury, and that the prosecution was caused and procured by the appellant without probable cause. The same objection is presented by the appellant to the ninth instruction, but the omission complained of is supplied by the next instruction, in which the question of malice, as in other instructions, was kept prominently before the jury as an essential fact to be established by the appellee in order to recover in the action. As was said by this court, in *Colee* v. *State*, 75 Ind. 511: "It is clear that, taking the instructions together, and it is proper to so take them, the law upon this point was correctly stated to the jury. It would be almost impossible, in a complicated case, for all the relevant rules of law to be stated in one instruction. At all events, it would be unreasonable to expect or require that each separate instruction, standing alone, should fully and correctly state the principles of law applicable to the case."

Two objections are made by the appellant to the seventh instruction: 1st. Because it stated that the material question was not where the note was executed, but was it really executed at all? 2d. Because it informed the jury that the

question of probable cause was a question of fact, of which they were the judges. In considering the first objection, it must be borne in mind that this instruction is to be considered in connection with, and as a part of, the fourth and fifth instructions, which related to the same subject. So considered, the instruction was not erroneous. The court, in its fifth instruction, said: "Did the plaintiff in this case, as a witness on the former trial, swear falsely, wilfully and corruptly upon the question as to whether Lavina Lytton executed the note in suit in good faith and without any fraud or false representations? If you find from the evidence that the plaintiff did so swear then you should find for the defendant.". It was not necessary for the court, in each of its instructions as to the execution of the note, to repeat that which had been stated in former instructions. It is fair to presume that the jury were sufficiently intelligent to comprehend the drift and meaning of the different instructions upon this subject, considered either separately or as an entirety. The statement of the court, in its seventh instruction, that "the material question was not where it (the note) was executed, but was it really executed at all," is to be, and doubtless was, by the jury, considered in connection with the statement in the former instruction, "without any fraud or false representations." The comments which we have made relative to the fifth instruction are applicable to this instruction.

As to the second objection to the instruction, the appellant incorrectly states its language. The court said: "Then you come to the last inquiry, if the defendant did procure said indictment to be returned, and the prosecution to be instituted, did he have no probable cause? Probable cause means that the party has possession of certain facts, either from information or actual knowledge, which would induce a reasonably prudent man to believe that the crime in question was committed." It will be observed that the court stated to the jury what constituted, in law, probable cause, and properly submitted

to them the question, whether the facts in this case, as shown by the evidence, established probable cause, as defined by the court.

The question of probable cause, where there is no conflict in the evidence, nor disputed facts, nor any doubt upon the evidence, or the inferences to be drawn from it, is one of law. But if the facts adduced as proof of want of probable cause are controverted, or if conflicting evidence is to be weighed, or if the credibility of witnesses is to be passed upon, the question of probable cause should go to the jury, with proper instructions as to the law. In such cases it is a mixed question of law and fact. 4 Wait Actions and Defenses, p. 344, and the cases there cited.

The appellant complains of the eleventh instruction, and contends that it is erroneous: 1st. Because it informed the jury that if they found for the appellee, in assessing his damages they should give "such damages as will compensate him for any actual expense and loss he has sustained by reason of the prosecution." 2d. Because the jury were told that they had the right to add such other damages as they thought, under the circumstances, would be proper as punitive damages.

The averment in the complaint relative to expenses actually incurred by the appellee by reason of the prosecution, was, "That he was compelled to expend and become liable for a large amount, to wit, $1,000, in employing counsel and preparing for the defence of the case." There was no averment that he had incurred any other expenses, or had sustained any losses, by reason of the prosecution. The only damages for expenses that he could have recovered, under this averment, were those therein mentioned; he was not entitled to recover damages for losses sustained by him, as none were averred. The instruction, in this respect, was erroneous, but it was a harmless error, as no evidence was introduced on the trial to prove that any such losses had been sustained by the appellee, or that any expenses had been incurred by him other than those caused by the employment of counsel to defend him on

the criminal charge. These he was entitled to recover, although they were then unpaid. *Ziegler* v. *Powell*, 54 Ind. 173. But the appellant has no cause to complain of that part of the instruction relating to compensatory damages, as the rule fixed by the court for their measurement, except in the respect to which we have referred, was restricted to narrower limits than the law justified. If, as in this case, the malicious prosecution complained of is founded upon a criminal charge, on which the defendant therein was arrested, he has a right to indemnity for all the injury to reputation, feelings, health, mind and person caused by the arrest, including the expenses of his defence. *Sheldon* v. *Carpenter*, 4 N. Y. 579; 2 Greenl. Ev., section 456; 3 Phillipps Ev., p. 573. The allegations of the complaint were sufficiently broad to authorize such damages, as they recited the arrest and imprisonment of the appellee.

The right in such actions to recover punitive damages is well settled by the authorities. The jury, in estimating damages, are not confined to the actual damages proved, but they may, in the exercise of a sound discretion, give exemplary or punitive damages. *Ziegler* v. *Powell*, *supra*; *Lawrence* v. *Hagerman*, 56 Ill. 68. The jury may take into consideration all the circumstances of the case, and award such damages as will not only be a compensation for the wrong and indignity sustained in consequence of the wrongful act, but may also award exemplary or punitive damages as a punishment for such act. *Stewart* v. *Cole*, 46 Ala. 646.

The general rule in assessing damages in cases like this, where the wrongful act complained of can not be punished by the criminal law, and the element of malice is involved, was correctly stated by this court in the case of *Taber* v. *Hutson*, 5 Ind. 322, and the rule as there declared has been since then recognized and approved by this court. See *Meyer* v. *Bohlfing*, 44 Ind. 238; *Millison* v. *Hoch*, 17 Ind. 227; *Nossaman* v. *Rickert*, 18 Ind. 350; *Sangster* v. *Prather*, 34 Ind. 504; *Guard* v. *Risk*, 11 Ind. 156.

In *Millison* v. *Hoch, supra*, this court said: "The instruction given, we think, is sustained by the case of *Taber* v. *Hutson*, 5 Ind. 322. The rule was there recognized, that where the offence is not punished by the criminal law of the land, and 'whenever the elements of fraud, malice, gross negligence or oppression, mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages.'"

The fourth cause assigned for a new trial was the refusal of the court to give to the jury the special instructions asked by the appellant, and numbered from one to five, inclusive.

The legal principles correctly stated in the first, second, third and fourth instructions, except the last clause of the first instruction, were clearly embraced in the instructions given by the court on its own motion, and for that reason no error was committed in refusing to give said special instructions. The clause of the first instruction referred to correctly asserts that in an action for malicious prosecution it is essential to the plaintiff's right of recovery for him to prove that the prosecution of which he complains terminated in his favor before the commencement of his action. See *Chapman* v. *Woods*, 6 Blackf. 504; *Hays* v. *Blizzard*, 30 Ind. 457; *Gorrell* v. *Snow*, 31 Ind. 215; *Richter* v. *Koster*, 45 Ind. 440. The principle so asserted was not embraced in the instructions given by the court, and although error was committed in refusing to give the instruction, it was a harmless one, as the evidence clearly established the fact that the prosecution complained of had so terminated. The evidence establishing this fact consisted of the record of the court, which showed the finding and return of the indictment, the motion to quash the indictment, and the action of the court in sustaining the motion and discharging the appellee. These facts were not disputed, although the appellant, as a proposition of law, controverted the sufficiency of the judgment to show a termination of the prosecution. If these facts had

not been proved, or if they had been disputed or controverted, then the giving of this instruction would have been of the utmost importance to the appellant, and its refusal would have been a harmful error of which he might justly complain. The refusal of a court to instruct the jury as to the necessity of proving some particular fact, which was clearly proved or not controverted, is not such an error as will authorize the reversal of a judgment.

The only part of the fourth instruction, not embraced in the instructions of the court, asserts that "attorneys are the proper advisers of men in doubtful circumstances, and their advice when fairly obtained exempts a party who acts upon it from the imputation of proceeding maliciously and without probable cause." This instruction did not state the law correctly. The mere fact that a party procures and acts upon the advice of an attorney so obtained, does not of itself exempt him from liability, or afford absolute justification of the prosecution, as stated in the instruction. It is merely competent evidence tending to rebut malice and the want of probable cause. *Smith* v. *Zent*, 59 Ind. 362; *McCarthy* v. *Kitchen*, 59 Ind. 500.

In *Scotten* v. *Longfellow*, 40 Ind. 30, it was held that such advice, to afford any protection, must be given upon a full and true statement of all the facts within the knowledge of the person seeking the advice, and it must be acted upon for an honest purpose. This instruction ignored the necessity which the law in such cases imposes upon the party to show that he gave to the attorney "a full and true statement of all the facts within his knowledge," and procured and acted upon the advice for an honest purpose. It was properly refused.

No error was committed in refusing to give the fifth instruction, which was as follows: "Before the plaintiff can recover in this case, it must be shown that the prosecution against him has terminated. The record in evidence shows that a motion to quash the indictment was sustained by the court, but that would not be sufficient unless it was followed

by a judgment of the court that the defendant be discharged, and go hence without day. No judgment of the court having been read in evidence, the plaintiff has failed to show that the prosecution has terminated, and you will therefore find for the defendant." The record mentioned was as follows: "Comes now the State by her prosecutor, and the defendant in person and by counsel, and moves the court to quash the indictment herein, which motion the court sustains, and said defendant is discharged." This judgment, though informal, showed a termination of the prosecution. If an indictment is quashed, and the defendant discharged by the judgment of the court, it is a sufficient termination of the prosecution to maintain an action for malicious prosecution. *Hays* v. *Blizzard, supra; Richter* v. *Koster, supra; Chapman* v. *Woods, supra.*

The fifth, sixth and seventh reasons assigned for a new trial are not discussed by the appellant in his brief, and for that reason we will not consider them.

No error was committed in overruling the motion for a new trial, and therefore the judgment must be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court be and it is hereby affirmed, at the costs of the appellant.

Filed Jan. 24, 1884. Petition for a rehearing overruled May 14, 1884.

95	361
125	120
95	361
168	345

No. 11,476.

GRAVES *v.* THOMAS.

VERDICT.—*Interrogatories to Jury.—Supreme Court.*—Answers by the jury to special interrogatories returned with a general verdict will not be considered by the Supreme Court, unless it appears by the record that the court, at the request of a party, sent them to the jury.

NEGLIGENCE.—*Excavation.*—When the public have by permission travelled on foot for years over an open city lot, it is the duty of the owner, upon making an excavation in the pathway, with a view to erecting a build-

ing, to put some guard or warning for public protection, and a failure to do so gives a right of action to one who, without fault, is injured thereby.

SAME.—*Evidence.*—In such case evidence showing such public use of the pathway is admissible.

SAME.—*Damages.*—In such case evidence that the person injured was poor and depended on labor for support may be admissible, as tending to prove that cessation from labor after the injury was caused by the injury.

From the Superior Court of Vigo County.

N. G. Buff and *I. N. Pierce*, for appellant.

C. F. McNutt, J. G. McNutt and *S. R. Hamell*, for appellee.

BLACK, C.—The appellee, Amelia Thomas, sued the appellant, Emeline Graves, and the trial of an issue formed by a denial of the complaint resulted in a verdict for the plaintiff for $125. A motion made by the defendant for judgment on the answers of the jury to special interrogatories, notwithstanding the general verdict, and her motion for a new trial were overruled, and judgment was rendered on the verdict. The rulings on these motions are assigned as errors.

Following the general verdict in the record are certain interrogatories and answers thereto signed by the foreman; but it is not affirmatively shown anywhere in the record that the court submitted the interrogatories to the jury, or that either party requested the court to do so. Therefore, this court can not inquire whether or not these answers were inconsistent with the general verdict. R. S. 1881, section 546; *Cleveland, etc., R. W. Co.* v. *Bowen*, 70 Ind. 478; *Hervey* v. *Parry*, 82 Ind. 263; *Watkins* v. *Pickering*, 92 Ind. 332.

In her motion for a new trial, the defendant, with other reasons, assigned that the verdict was not sustained by sufficient evidence, and that the verdict was contrary to law.

The action was for the recovery of damages for injuries suffered by the plaintiff from falling into an excavation for a cellar recently made by the defendant upon a lot adjoining a street and sidewalk in the city of Terre Haute, the defendant having negligently failed to guard said excavation, or to place any signal at or near it to warn pedestrians passing along said

sidewalk, it being alleged that while the excavation was in such condition the plaintiff was walking along said sidewalk, and, without any fault or negligence on her part, fell into said excavation.

The evidence showed that the defendant's lot was bordered on the west by the street and sidewalk, and on the north by a vacant lot; that the excavation, made about one week before the accident, preparatory to the building of a storehouse, was eight feet deep, thirty feet long, extending to the sidewalk, and eighteen feet wide, the north line thereof being about five feet from the north line of defendant's lot; that there were two paths, one being along the sidewalk proper, and the other diverging from it and returning to it, passing over said vacant lot on the north of defendant's lot and over the defendant's lot, the latter path, which was about forty feet long, being upon higher ground than the path along the sidewalk proper; that about eight or nine o'clock on a dark and rainy evening, the plaintiff, alone and without a lantern, was walking southward along said street, on her way to visit a sick friend; that she took the upper path, and, pursuing it, fell into the cellar on the north side thereof, about ten feet from the west end of the cellar, and was injured by the fall. The people generally passed over these lots in wet or muddy weather, instead of passing over the lower path, and they had done so for about eight years. The defendant had owned her said lot about six months. There was a ridge a foot or two feet high, made of earth thrown out, on the north side of the cellar, and two or three feet from it, but there was no guard or protection of any kind on that side of the cellar. The plaintiff had moved from another part of the city into the neighborhood, two squares away from the cellar, three days before the accident. About six years before, she was well acquainted with the premises, and passed along said street and over the same place where she fell. About one year before the accident she passed along the same place, but she had not seen it afterward until the night of the accident, and

she did not know that a building was being put up on the defendant's lot.

In *Young* v. *Harvey*, 16 Ind. 314, in discussing the question whether one who had dug and had left exposed a pit on his uninclosed lot, near the line of a street, was liable to another person for the value of the latter's horse which fell into the pit and was killed, it was said, that if the probability that such an accident might happen from thus leaving the pit exposed was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard the community from the danger to which the pit exposed its members, in person or property, he was liable to an action for the loss occurring through his neglect to perform that duty.

In Wharton on Negligence, section 349, is this language: "Nor am I justified in making excavations either on the path which I have permitted other persons to traverse, or so near a public road that travellers, in the ordinary aberrations or casualties of travel may stray or be driven over the line and be injured by falling into the excavation."

In *Beck* v. *Carter*, 68 N. Y. 283 (23 Am. R. 175), the defendant had for a long time allowed a portion of his lot adjoining a street to be used by the public as a part of the highway. He made an excavation in his lot about ten feet from the line of the street. The plaintiff, while passing over the lot in the dark, fell into the excavation and was thereby injured. It was held that the defendant was liable, and the Court of Appeals approved a charge instructing the jury that it made no difference whether the excavation was seven or nine or ten feet from the originally established boundaries of the thoroughfare; that if it was so situated that a person lawfully using the thoroughfare was liable to fall into it, the defendant was liable.

In the case at bar, we think that the fact that for a long period the public, using the sidewalk, had been permitted to use the place where the plaintiff fell as a part of the sidewalk, made it the duty of the defendant to guard the excava-

tion made at that place; and that the jury were authorized to find from the evidence that the plaintiff did not, by her own negligence, contribute to her injury.

It follows that there was no error in admitting, over the defendant's objection, evidence of such use by the public of the upper pathway.

The evidence is set out in the record in narrative form. The plaintiff testified as a witness in her own behalf. After setting forth her testimony concerning the circumstances of the accident and the character of her injuries, the record proceeds as follows: "She is poor, and has no property, and works for a living by washing and ironing for families. She has not been able to do this kind of work since her fall, until the last few weeks; her circumstances compelled her to resort to it again when she was really not able. The defendant objected to the evidence as to plaintiff's financial condition and as to the necessity of working for families to support herself, for the reason that the same is irrelevant and immaterial. The court overruled the objection and permitted the witness to testify as to such matters, to which action and ruling of the court the defendant at the time excepted."

It is impossible to know to what question or questions the defendant objected, and the purpose for which the evidence was admitted is not stated. It must be treated as having been introduced for a legitimate purpose, if it was admissible for any purpose.

To aid the jury in estimating the plaintiff's damages, it was proper to prove the character and extent of the employment by which she ordinarily supported herself, and to show to what extent her pursuit of that employment was prevented or interfered with by her injuries. Evidence that she was poor and had no property would tend to prove that during the time in which, after the accident, she ceased to work at the employment by which she usually supported herself, she did so because she was compelled by her injuries, and would tend to sustain her statement that when she commenced to

work again she was not wholly restored from the effects of her fall. *Caldwell* v. *Murphy*, 11 N. Y. 416.

The motion for a new trial assigned as reasons the giving of certain instructions, the refusal of others and the modification of others. We see nothing in the very slight mention of these reasons, in the appellant's brief, that can affect a proper result, which appears to have been reached.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the appellant's costs.

Filed May 10, 1884.

No. 11,107.

96 366
141 539

NEW *v.* NEW.

SUPREME COURT.—*Instruction.*—*Evidence.*—*Record.*—Where the evidence is not in the record, rulings in giving or refusing instructions are not ground for reversal, if upon any supposable state of the evidence under the issues the rulings would have been correct.

SAME.—*Harmless Error.*—The Supreme Court will not reverse a judgment for error in giving or refusing instructions, where the verdict is clearly right upon the evidence. Nor will the Supreme Court reverse a judgment unless material and substantial error is shown.

From the Hamilton Circuit Court.

R. Hill, J. W. Nichol, T. J. Kane and *T. P. Davis*, for appellant.

J. E. McDonald, J. M. Butler and *A. L. Mason*, for appellee.

ELLIOTT, J.—It has long been the rule that where the evidence is not in the record, the rulings of the trial court in giving and refusing instructions will not be ground for reversal, if upon any supposable state of the evidence that might have existed under the issues the rulings might have been correct. We have given full consideration to the able brief of appellant's counsel, but find nothing that influences us to make this case an exception to the long established rule. We are clear that under the issues the evidence might have been such as to

have warranted the rulings of the court, and as the evidence is not in the record we must presume that the trial court committed no error.

The rule of this court has been for many years not to reverse a judgment for error in giving or refusing instructions, if the verdict is clearly right on the evidence, and this consideration should be borne in mind when passing upon cases in which the evidence is not before us, for it may have been of such a conclusive character as to require an affirmance of the judgment irrespective of the effect of the instructions.

It is also a familiar rule that one who seeks a reversal of a judgment must show affirmatively not only that there was an error, but that there was a substantial error, which did him material harm. It is not enough to show an error; it must be shown to have been such as prejudiced the appellant's cause, or, at least, was likely to have done so.

There are, therefore, strong reasons for the rule that errors in instructions are seldom cause for reversal in cases where the evidence is not in the record, and these reasons also prove that the rule is one which should be strictly adhered to.

Judgment affirmed.

Filed April 26, 1884.

No. 11,630.

LEMASTERS *v.* THE STATE.

CRIMINAL LAW.—*Forgery.* — *Promissory Note.* — *Execution.* — *Indictment.*— Where the defendant is charged with forgery, in uttering and passing as true a forged promissory note, of which a copy is set out, the indictment will not be held bad on motion to quash, merely because of the defective or imperfect execution of the note, when it appears on its face to be such an instrument as might deceive.

From the Tipton Circuit Court.

D. Waugh and *J. P. Kemp*, for appellant.

F. T. Hord, Attorney General, *C. C. Shirley*, Prosecuting Attorney, *J. A. Swoveland* and *W. B. Hord*, for the State.

HOWK, C. J.—The indictment in this case contained two counts, in each of which the appellant, Lemasters, was charged with the crime of forgery. His motion to quash each count having been overruled by the court, upon arraignment he entered his plea that he was not guilty, as charged in the indictment. The issues joined were tried by a jury, and a verdict was returned finding the appellant guilty as charged in the first count of the indictment, and assessing his punishment at imprisonment in the State's prison for the term of two years, and a fine of $10. Over his motion for a new trial, the court rendered judgment against him on the verdict.

The only question presented for our decision, by the appellant's assignment of error and the argument of his counsel, is the sufficiency of the first count of the indictment. In this count, it was charged that the appellant, Lemasters, on the 3d day of April, 1883, at Tipton county, "did then and there, feloniously and fraudulently, utter, publish and pass to one Absalom M. Vickrey, as true and genuine, a certain false, forged and counterfeit promissory note for the payment of money, purporting to have been made and executed by one John T. Mozings to and in favor of Charles Holmes, or order, which said false, forged and counterfeit note is of the tenor following, to wit:" (Setting out a copy of the note, which we omit.) "With intent then and there, and thereby, at the time he did so feloniously and fraudulently utter, publish and pass said false, forged and counterfeit promissory note, feloniously and fraudulently, to prejudice, damage and defraud him, the said Absalom M. Vickrey, he, the said George Lemasters, then and there, at the time, well knowing the said promissory note to be false, forged and counterfeit, contrary to the form of the statute," etc.

The promissory note, upon which the charge of forgery is predicated, appears to have been signed by the maker, as follows: "John per T. Mozings." It will be observed that, almark.

though it was apparently intended the maker of the note should execute it by making his mark, yet there is no mark in the blank space left for a mark as above, between the words "per" and "mark." It is earnestly insisted by the appellant's counsel, that, in the absence or for the want of this mark, the promissory note had not been signed or executed by the maker and had no legal effect, and, therefore, it could not be the subject of forgery. Counsel say: "The note upon its face shows that it is incomplete, that it was intended to be signed by the maker by his mark, and, his mark not being there, it could deceive no one and must be held in law, upon its face, as an unsigned and unexecuted note. This is a simple charge of forgery, no extrinsic matter is averred, and hence we must look to the face of the note for its legal bearing."

The promissory note, set out in the indictment, was manifestly prepared from a printed blank form, and it is perfect and complete in all its parts, except, as we have said, that there is no mark in the space where it was apparently intended that the maker of the note should insert his mark. Whether or not such a note, so executed, would or could deceive any one, is a question of fact for the jury, and not of law for the court. The case at bar is very similar to *Harding* v. *State*, 54 Ind. 359; and substantially the same objection was taken to, and the same argument made against, the sufficiency of the indictment in the case cited as in this case. The court there said: "The argument of appellant's counsel is this: Appellant was indicted for forging a promissory note; it appears upon the face of the indictment, that the instrument forged was not a promissory note, and therefore, his conclusion is, the indictment was insufficient and ought to have been quashed. But, from our standpoint, the argument is unsound and illogical. In our view of the case, appellant was indicted for forging a certain instrument, which is set out in the indictment; we look to the copy of the instrument, and not to

the name which may be given the instrument, to determine whether or not the instrument appears on its face to be of such a character, that a charge of forgery could be predicated thereon. When we find, as we do in this case, that the indictment charges the forgery of an instrument, which appears on its face, from the copy thereof set out in the indictment, to be naturally calculated to have some effect,"—we can not hold, as matter of law, that the indictment ought to be quashed, merely because of some technical defect or imperfection, requiring close scrutiny to discern it, in the execution of such instrument. To the same effect, substantially, are the cases of *Reed* v. *State*, 28 Ind. 396, and *Powers* v. *State*, 87 Ind. 97.

We are of opinion, therefore, that the trial court committed no error, in the case at bar, in overruling the appellant's motion to quash the first count of the indictment. The evidence is not in the record, and no other error is complained of, in argument, by the appellant's counsel.

The judgment is affirmed, with costs.

Filed May 14, 1884.

95 370
129 561

No. 11,375.

Albertson *v.* The State, ex rel. Wells.

Drainage.—*Circuit Court Act.—Complaint to Collect Assessment.—Petition, Notice, Kinship.—Presumption.*—In an action to collect ditch assessments under the circuit court act, the complaint need not allege that the petition for the ditch had been verified, nor that notice thereof had been given, nor that the commissioners of drainage were not of kin to the parties interested, the presumption being, in the absence of an allegation to the contrary, that in each of these particulars the statute was complied with.

Same.—*Copy.*—Such complaint is based upon the assessments, and, therefore, need not set out a copy of the judgment approving the report of the ditch commissioners.

Same.—*Approval of Assessments.—Judgment.*—Such complaint sufficiently alleges that such assessments were approved by the court, when it alleges "that three days had elapsed since the filing of the report, and, no remonstrance being filed, the court approved said report and appointed the relator as ditch commissioner to construct" the ditch.

From the Hamilton Circuit Court.

D. Moss, R. R. Stephenson and *H. A. Lee*, for appellant.

J. A. Roberts and *T. E. Boyd*, for appellee.

FRANKLIN, C.—Appellee commenced this action to collect assessments alleged to be due on the construction of a certain ditch. A demurrer was sustained to the answer, and judgment rendered for the plaintiff.

Appellant has assigned error upon the sustaining of the demurrer to the answer, and insists that it should have been sustained to the complaint.

Five reasons are urged against the sufficiency of the complaint: *First.* It does not show that the original petition was verified.

This is not an appeal from the proceedings to establish the ditch, nor from a direct attack to set aside said proceedings, but from a collateral proceeding to collect assessments based upon the original proceedings; which proceedings, if not shown to be void, are conclusive in this proceeding. The record not showing the contrary, the presumption is that the original petition was verified as required by the statute.

The second is that it does not show that the proper notice was given of the pendency in court of the original petition.

The averment in the complaint is, "that at the April term, 1882, of the court, James Orear presented his petition praying for the drainage of his lands described in said petition; that such proceedings were had at the said April term of court, that the matters in said petition were referred to the commissioners of drainage, and the cause was continued." In the circuit court, it being a court of general jurisdiction, all reasonable presumptions are in favor of the action of the court; and where the record does not show the contrary, nor what notice was given, it will be presumed that the proper notice was given, or the court would not have referred the matter to the drainage commissioners. *Horner* v. *Doe*, 1 Ind. 130. This is the well settled rule of law. See the cases of *Crane*

v. *Kimmer*, 77 Ind. 215, and *Cavanaugh* v. *Smith*, 84 Ind. 380, with the authorities therein cited. The case relied on by appellant, of *Scott* v. *Brackett*, 89 Ind. 413, is not in conflict with the foregoing. In that case, the original proceedings were directly attacked by petition and motion to set aside the judgment establishing the proposed ditch, asking to have it set aside for the reason that no sufficient notice of its pendency had been given, and the record showed the want of notice. The proceedings were held void on that account. In this case the complaint does not show any want of notice. Where the court has jurisdiction of the subject-matter, jurisdiction of the person will be presumed.

The third objection is that the complaint does not show that the commissioners of drainage were not of kin to any of the parties interested.

This objection, for the reasons heretofore stated, is insufficient.

The fourth is, that no copy of the judgment of approval of the report of commissioners is filed with the complaint. This action is based upon the assessments, and not upon the judgment of approval; therefore, in such a case, a copy of the judgment need not be filed with the complaint.

The cases of *Scott* v. *State, etc.*, 89 Ind. 368, and *Smith* v. *Clifford*, 83 Ind. 520, referred to by appellant, do not support his objection. In the latter case it was held that the action was upon the assessments, and that a copy of the assessments must be filed with the complaint. No such objection as that is made in this case. In the former case this question is not referred to. It has also been held by this court, that a judgment is not a "written instrument" within the meaning of the statute requiring a copy to be filed with the complaint. *Lytle* v. *Lytle*, 37 Ind. 281; *Mull* v. *McKnight*, 67 Ind. 525.

The fifth and last objection to the complaint is, that there is no sufficient averment that the court approved the assessment. The averment in the complaint is, "That three days had elapsed since the filing of said report by said commis-

sioners, and no remonstrance being filed to the same, the court approved said report, and ordered said ditch constructed, and appointed said relator as ditch commissioner to construct the same." We think the averment in relation to the judgment of approval is sufficient on demurrer. And the 4280th section, R. S. 1881, provides that "This act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands; and collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries; but such judgment shall be conclusive that all prior proceedings were regular and according to law."

In accordance with the spirit of this statute, we think the complaint in this case is sufficient, and that there was no error in sustaining the demurrer to the answer.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed May 14, 1884.

No. 10,096.

MACKISON *v.* CLEGG ET AL.

PRACTICE.—*Trespass.*—*Damages.*—*New Trial.*—*Supreme Court.*—Error in awarding too small an amount as damages in an action for an alleged trespass in ejecting the plaintiff from a house, must be made ground of a motion for a new trial, or it can not be considered by the Supreme Court on appeal.

SAME.—*Costs.*—Where, in such an action, the plaintiff recovers but one cent damages, he is entitled to judgment for but one cent costs.

SAME.—*Record.*—*Title to Real Estate.*—*Presumption.*—Where, on appeal to the Supreme Court, the record does not contain the answer and all the evidence, that court can not determine whether the title to real estate was in issue, and must presume that the judgment below was right.

From the Clark Circuit Court.

J. B. Merriwether, J. L. Ingram and *P. H. Jewett*, for appellant.

HAMMOND, J.—The appellant, who was the plaintiff in the court below, charged in her complaint that on April 12th, 1881, she was in possession of a certain house in Clark county, with her household furniture; that the appellees on said day, with force and without her leave and without right, took possession of said house and household furniture and threw said furniture out doors, breaking and destroying the same, to her damage in the sum of $500, for which she demanded judgment.

The transcript shows that the appellees filed an answer, but it is not in the record. The case was tried by a jury who returned a verdict for the appellant, assessing her damages at one cent. Appellant moved for a new trial, assigning for causes that the verdict was not sustained by sufficient evidence and was contrary to law. The motion was overruled. Appellant then moved for judgment on the verdict and all costs of suit, which was also overruled. Appellees, thereupon, moved that the appellant should recover only one cent of her costs, being the same amount as the verdict for damages in her favor. This motion was sustained. Judgment was then rendered that the appellant recover of the appellees one cent for her damages and one cent of her costs.

It is urged that there was error in overruling the appellant's motion for a new trial, and in refusing to render judgment in her favor for all her costs.

The objection made to the verdict is that the amount found in favor of the appellant was not as much as she was entitled to recover under the evidence. But this question was not presented in the appellant's motion for a new trial. If she was not satisfied with the amount awarded her by the jury, she should, in her motion for a new trial, have specified that

there was error in the assessment of her damages on account of such assessment being too small. Section 559, R. S. 1881; *Frank* v. *Kessler*, 30 Ind. 8; *Floyd* v. *Maddux*, 68 Ind. 124; *Kelso* v. *Wolf*, 70 Ind. 105; *Millikan* v. *Patterson*, 91 Ind. 515.

Section 592, R. S. 1881, provides that, "In all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question."

The ruling of the court was right upon costs unless the title to real estate was in issue. It is obvious that if the record does not contain the pleadings and the evidence, this court can not say whether there was, in the trial of the case, any question upon the title to real estate. It is necessary for the record to contain the pleadings to show whether it was a case in which the title to land *could* be in issue; and also essential that it should embrace the evidence to show whether in fact the title to real estate *was* in issue. 2 Works Pr., section 1017. The appellees' answer is not in the record, nor does the record contain all the evidence. The appellant's deposition, which was read in evidence by the appellees, is not in the transcript.

It devolves upon a party, bringing a case to this court, to show affirmatively, by the record, that there was error in the proceedings of the trial court, and if he fail to do this, we must presume in favor of the correctness of such proceedings. *Crumley* v. *Hickman*, 92 Ind. 388.

We find no error requiring a reversal of the judgment.

Affirmed, with costs.

Filed May 14, 1884.

No. 10,686.

JONES *v.* ANGELL.

PRACTICE.—*Failure to Answer Interrogatories.—Venire De Novo.—Waiver.*—Where neither motion nor objection is made on the ground that a jury has failed to return, with their general verdict, answers to interrogatories put to them, a *venire de novo* will not lie on that ground.

EVIDENCE.—*Witness.—Expert.*—An expert may not only give his opinion, but may state facts which are the result of scientific knowledge or professional skill.

SAME.—*Malpractice.—Action against Surgeon.*—In an action against a surgeon for malpractice, the admission of evidence by the defendant, that he had neither received nor charged any fee for his services, is harmless to the plaintiff.

SAME.—*Opinion as to Skill.*—In such action it was competent for the defendant to testify that a surgeon who had assisted him to perform the act of surgery in question, was skilful.

SAME.—*Instruction as to Failure of Proof.*—It was proper to instruct the jury that if the plaintiff's evidence failed to preponderate as to any material allegation of any paragraph of his complaint, he could not recover on that paragraph; and that, if the evidence as to any material allegations of each paragraph was so balanced that there was no preponderance in his favor, he could not recover at all.

SAME.—*Contributory Negligence.*—Evidence of alleged disobedience by the defendant of the professional instructions of the plaintiff may properly be referred to by the court, in its instructions, in directing the attention of the jury to the question of contributory negligence.

SAME.—*Words of Synonymous Meaning.*—Where, in such instructions, the court, in referring to the skill required of the defendant, uses the terms "*fair*" knowledge as the synonym of "*reasonable*" knowledge, there is no error.

PRACTICE.—*Objections to Evidence.—Competency.*—Objections to the competency of evidence should clearly point out to the trial court the ground of the incompetency.

SAME.—*Harmless Instruction.*—An instruction which, though abstractly erroneous, works no injury in the particular case wherein it is given, is harmless.

From the Tippecanoe Circuit Court.

R. Gregory, J. R. Coffroth and *T. A. Stewart*, for appellant.

J. Applegate and *C. R. Pollard*, for appellee.

COLERICK, C.—This action was brought by the appellant

against the appellee for alleged malpractice on the part of the appellee, as a surgeon, in not properly setting and treating the appellant's broken arm. The complaint consisted of two paragraphs. It is unnecessary to refer to its averments, as no question involving their sufficiency has been presented for our consideration. An answer of general denial was filed. The issues were tried by a jury, and resulted in the rendition of a verdict and judgment in favor of the appellee. Motions for a *venire de novo*, new trial, and in arrest of judgment were overruled, and these rulings are assigned as errors.

The motion for a *venire de novo* was in writing, and recited as the sole cause for its support that the court erred in discharging the jury without requiring them to answer the interrogatories, five in number, that had been submitted to them, at the instance of the appellee, and which the jury were directed by the court to answer in case they found a general verdict. The bill of exceptions, reserving this question, shows that the jury returned a general verdict in favor of the appellee, but failed to answer the interrogatories, to which omission the attention of counsel was called before the discharge of the jury, but no objection to the omission being made, or any motion interposed to require the interrogatories to be answered, the jury were discharged without answering them.

It is settled, as a rule of practice in this State, by the decisions of this court, that objections to imperfect or incomplete answers to interrogatories submitted to a jury are waived unless made before the discharge of the jury. See *City of Huntington* v. *Breen*, 77 Ind. 29, and the cases there cited. This rule applies with equal force to cases where the jury are discharged, in the absence of objection, without answering the interrogatories submitted to them, as it does in cases where the interrogatories are imperfectly or defectively answered. No error was committed in overruling the motion for a *venire de novo*.

The only reasons assigned in support of the motion for a new trial that have been urged or discussed by the appellant

in this court are, that the court erred on the trial of the case in admitting certain evidence, which is referred to in the motion, and in giving certain instructions to the jury at the request of the appellee. The evidence referred to, except that hereafter mentioned, was rendered by physicians, who had been called as experts, to testify to subjects relating to surgery. The evidence rendered by them was relevant and material. The only objection to the evidence that has been discussed by the appellant in his brief relates to its competency. If any objection on that ground existed it was insufficiently stated in the court below to present the question for consideration. An objection, as was made in this case, that the evidence offered is incompetent, without specifically stating the grounds upon which the objection is founded, is too indefinite to present any question. See *Lake Erie, etc., R. W. Co.* v. *Parker*, 94 Ind. 91, and the cases there cited; also *McClellan* v. *Bond*, 92 Ind. 424.

The opinion of an expert in any art, science, trade, profession or mystery may be given where it is proper for the decision of a question relating to the issues in the case. See *Indiana, etc., R. W. Co.* v. *Hale*, 93 Ind. 79. One who is an expert may not only give opinions, but may state facts which are the result of a scientific knowlege or professional skill. *Emerson* v. *Lowell, etc., Co.*, 6 Allen, 146. The evidence was properly admitted by the court.

The appellant insists that the court erred in allowing the appellee to testify that he had received no compensation from, and had made no charge against, the appellant, for the services which he rendered in treating the appellant's injury, and the case of *Baird* v. *Gillett*, 47 N. Y. 186, is cited by the appellant in support of his assertion. In the case cited, which was an action for malpractice, the trial court admitted proof by the plaintiff that the defendant had never presented any bill, or asked any pay, for his services. The proof was admitted by the court, as a circumstance, in the nature of an

admission, tending to prove that the defendant was guilty of malpractice as charged. On appeal it was held that the court below erred in admitting the evidence. The tendency of such proof, if competent, would be favorable to the plaintiff in a case like this. If error was committed in this case in permitting such proof to be made, it did not affect or prejudice the rights of the appellant, and, therefore, was a harmless error. It is firmly settled by many cases that a judgment will not be reversed by this court for harmless errors committed in the court below. Buskirk Pr., p. 284.

It is also claimed by the appellant that the court erred in permitting the appellee to prove that Doctor Richardson, who assisted him in setting the fractured arm, was a skilful physician and surgeon. The evidence. was evidently introduced for the purpose of showing that Doctor Richardson was a suitable person to render the services performed by him, and for that purpose it was competent.

The instructions referred to in the motion for a new trial that have been assailed in this court are those numbered one, four, six, eight and eleven. The first instruction was as follows: "To entitle the plaintiff to recover in this action, he must have proved by a preponderance of evidence every material allegation in one of the paragraphs of his complaint. If, therefore, upon any material allegation of either paragraph of the complaint the evidence is equally balanced, upon that paragraph of the complaint your verdict must be for the defendant; and if, in both paragraphs, there be one or more material allegations upon which the evidence is equally balanced, then upon the whole case your verdict must be for the defendant." The objection urged by the appellant to this instruction is, that it incorrectly informed the jury that if the appellant failed to prove any material allegation of both paragraphs they should find for the defendant, which, it is asserted, was wrong, because a material allegation of one paragraph might be unproven, and yet a complete cause of action made out under the other. We do not think that the instruc-

tion can be fairly so construed. It clearly and distinctly informed the jury that to defeat a recovery, for the cause mentioned, there must be a failure of proof as to one or more material allegations in *both* paragraphs, not one, of the complaint.

The fourth instruction was, "If you find that the injuries of which plaintiff complains were caused wholly or in part by his own acts or negligence, then he can not recover. It is the duty of a patient to observe and follow the reasonable directions of his physician and surgeon. If the plaintiff, after having been treated for some time by the defendant, upon going away from the place where the treatment had been given, was instructed by the defendant to return for further treatment as soon as he began to suffer pain, and that although he suffered pain he neglected for a week to return for treatment, this is a fact for you to take into consideration, with the other facts of the case, in determining whether the plaintiff himself was not negligent." There was evidence establishing, or strongly tending to establish, the fact alluded to in the instruction. It was an important fact to be considered by the jury, with the other facts in the case, in determining the question whether the appellant by his own negligence, or want of care, caused, or contributed in causing, the injuries of which he complained, and it was not improper for the court to direct, in the manner it did, the attention of the jury to the fact. Its existence was not assumed by the court, as asserted by the appellant. The instruction merely stated, in effect, that if such fact existed, it should be considered by the jury with the other facts in the case, in determining whether the appellant himself was not negligent.

It is the duty of a patient, as stated in the instruction, to submit to the treatment prescribed by his physician, and to follow the necessary or reasonable directions given by him. *McCandless* v. *McWha*, 22 Pa. St. 261; *Potter* v. *Warner*, 91 Pa. St. 362 (36 Am. R. 668); *Geiselman* v. *Scott*, 25 Ohio St. 86; Elwell Malpractice, 127; Shearm. & Redf. Neg., section 443; McClelland Civil Malpractice 510.

If the patient, by refusing to adopt the remedies or comply with the directions of the physicians, frustrates or defeats the endeavors of the physician, or if he aggravates the case by his misconduct, he can not charge to the physician the consequences due distinctly to himself. Whart. Neg., section 737. A party seeking to recover for an injury must not have contributed to it in any degree, either by his negligence or the disregard of a duty imposed upon him by his physician, who, by his negligence, or want of care or skill, may also, in some degree, have contributed to the injury. *Geiselman* v. *Scott*, *supra*. If the contributory negligence of the patient united in producing the injuries complained of, the physician is not liable for damages therefor. *Potter* v. *Warner*, *supra*; *McCandless* v. *McWha*, *supra*; *Scudder* v. *Crossan*, 43 Ind. 343; *Gramm* v. *Boener*, 56 Ind. 497. The instruction is in harmony with, and fully sustained by, the authorities which we have cited, and is not in conflict with the case of *Hibbard* v. *Thompson*, 109 Mass. 286, cited by the appellant, where it was held that if the negligence of the patient can be separated from that of the physician, the patient may recover for such *separate* injury as proceeded *solely* from the *distinct* negligence of the physician. No error was committed in giving this instruction to the jury.

The sixth instruction was as follows: "If you find that while the plaintiff needed medical and surgical skill and treatment he withdrew from the defendant's care and attention, and failed to procure other medical and surgical attention, and this without any fault of the defendant, then he can not recover, unless for the time he withdrew himself there had been some lack upon the defendant's part of proper care and skill."

This instruction does not state the law with sufficient accuracy, but as applied to the facts in this case it was not erroneous. Although abstractly an instruction may be erroneous, still if, under the facts of the case, the party who excepts is not injured thereby the judgment will not be reversed. *Morford* v. *Woodworth*, 7 Ind. 83; *Hall* v. *State*, 8 Ind. 439;

Hayden v. *Souger*, 56 Ind. 42 (26 Am. R. 1); *Simpkins* v. *Smith*, 94 Ind. 470.

The only objection that has been urged by the appellant against the eighth instruction, which related alone to the evidence in the case, is that it assumed that certain facts had not been proven. We have carefully examined the instruction and find that it is not subject to such an objection.

The eleventh instruction was as follows: "A surgeon in the treatment of a fractured arm (is not required) to have an infallible judgment or perfect skill. If possessed of fair or ordinary knowledge and skill, and if he exercises them to the best of his ability he is not bound to warrant his judgment. Acting in good faith a properly qualified physician or surgeon may do an act or adopt a treatment which may do harm and produce a bad result, yet if done in good faith and in the exercise of *fair* knowledge and skill he would not be liable."

The only objection urged by the appellant to this instruction is that the expression "*fair* knowledge and skill" is used in lieu of the phrase "*reasonable* or *ordinary* knowledge and skill." It will be observed that in the first part of the instruction the phrase employed was "*fair* or *ordinary* knowledge and skill." It is quite evident that the words "fair" and "ordinary" were used by the court as synonyms. Webster, in his dictionary, gives as a synonym for "fair" the word "reasonable."

In *Carpenter* v. *Blake*, 60 Barb. 488, a similar objection was made to an instruction like the one under consideration, where the court, after first using the words "reasonable and ordinary skill," used in a subsequent part of the same instruction the phrase "average skill." It was held that the phrase last employed was evidently used as equivalent to the one first employed. The court, by MULLIN, P. J., said: "It seems to me to be impossible to misunderstand this part of the charge. The judge lays down the rule as it is given by writers on the law, and by the judges in their instructions to juries, and a change of phraseology does not change the rule; at all events,

it is obvious that the judge, in the last sentence cited, did not intend to modify or vary the rule as it had previously been laid down by him." We do not think that the jury could have been misled by this instruction. No error was committed in giving it to the jury.

This disposes of all the questions presented in the case, and there being no error in the record, the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed May 14, 1884.

95 386
125 344

No. 10,859.

HANNA, EXECUTOR, *v.* FISHER.

DECEDENTS' ESTATES.—*Claim Against.*—*Promissory Note.*—*Attorney's Fees.*—*Pleading.*—*Demand.*—Where a promissory note stipulating for the payment of attorney's fees is filed against a decedent's estate, the claimant is entitled to introduce evidence of the value of attorney's fees, without any formal demand in such claim for judgment.

SAME.—*Costs.*—*Claim.*—*Verification of.*—Where a claim against a decedent's estate is verified by some one other than the claimant, that fact will not authorize the taxing of costs against the claimant, although the claim does not disclose that the affiant is the agent or attorney of the claimant.

SAME.—*Costs where a Claim is not Verified.*—If a claim against a decedent's estate be not duly verified until after it has been filed, the claimant. under section 2310, R. S. 1881, shall be bound for all costs in the prosecution of the claim.

WARRANTY.—*Breach.*—*Unpaid Taxes.*—*Receipt.*—*Order of Evidence.*—If an action or defence be founded upon an alleged breach of warranty in that a grantee has been forced to pay taxes assessed against the grantor upon the property conveyed, it is a harmless error to exclude the tax receipt, where the grantor declines to introduce other evidence showing that such taxes had been properly assessed by officers having due authority.

From the Montgomery Circuit Court.

N. P. H. Proctor, for appellant.

D. A. Roach, for appellee.

ELLIOTT, J.—The appellee filed a claim against the estate represented by the appellant; the claim was founded on a promissory note stipulating for attorney's fees. The appellant pleaded as a set-off that the appellee had executed to the testator, Matthias L. Giltner, in his lifetime, a warranty deed; that there was at the time of the execution of the deed a lien for taxes which the covenantee in the deed was compelled to pay.

There was no error in permitting the appellee to give evidence of the value of the attorney's fees stipulated for in the note. The provision in the note which constituted the basis of appellee's claim fully apprised the appellant of the nature of the demand urged against him, and it was his duty, if he had a defence to any part or all of the demand evidenced by the note, to prepare to meet what the claim filed by the appellee showed was demanded. As no formal pleading was necessary in such a case as this, it was not, of course, necessary to add to the claim any formal demand for judgment of any kind.

The court refused to admit in evidence a tax receipt offered by the appellant, and of this ruling complaint is made. Ordinarily, tax receipts may be given in evidence to prove payment of taxes, but the receipts themselves are simply evidence that money was paid to the treasurer; they are not evidence that the taxes were duly assessed. The statute of 1881 does not make the receipt evidence that the tax had been duly assessed, its whole office is to evidence the payment of money to the treasurer. As the receipt has no other force than that stated, no material error is committed in excluding it where it does not appear that the taxes had been assessed.

In the present case the court refused to allow the receipt to be read in evidence, "unless," to quote from the record, "the defendant would agree to introduce other proper evidence that said real estate had been properly assessed and placed upon the tax duplicate, and that the tax specified in

the receipt had been levied by the proper authorities." The defendant declined to agree to introduce any other evidence, and thereupon the court refused to permit the receipt to be read. It can not be said that the ruling of the court injured the appellant. It would have done him no good to have introduced the receipt without some evidence that the taxes had been assessed. We need not and do not decide what evidence is necessary to entitle a grantee who has paid taxes to recover for breach of warranty, but we do decide that some evidence in addition to that supplied by the receipt is necessary. There must be some evidence that the taxes were assessed, and by persons having some authority to assess them. *Barker* v. *Hobbs*, 6 Ind. 385; *Robinson* v. *Murphy*, 33 Ind. 482. As there was no such evidence offered, and as the appellant refused to agree to offer such evidence, we can not perceive that any harm was done him.

It is not enough for an appellant to show that an error was committed; he must show that it in some way worked him an injury. A harmless error is never cause for reversal.

A party is generally allowed to offer his evidence in the order he chooses, but he can not demand this as a matter of right. Where other evidence is essential to make that offered competent or material, the court may require the party to first introduce the evidence which fixes the competency of that offered. A different rule would often result in occupying time in hearing evidence that the jury have no right to consider, because other evidence essential to make it competent is wanting. A party who refuses to agree to adduce evidence essential to make competent that which he offers has no just reason to complain of a ruling excluding that offered.

The trial court did right in instructing the jury to find for the appellee, for there was no conflict in the evidence, and it was of such a character as gave him a right of recovery.

It is insisted that the court erred in overruling the motion to tax the costs against the appellee. The claim was filed on

the 4th day of October, 1882, and on the 20th day of the following month, transferred to the issue docket, and on the 9th day of February, 1883, the claim was verified. The affidavit was made by Alfred Fisher, but it is not stated that he was the agent or attorney of the claimant, and it is insisted that it is, therefore, insufficient, and that the appellee is bound for all costs. The statute provides that the affidavit shall be filed by the claimant, his agent, or attorney, but it does not provide that the relationship of the affiant shall be stated. The object of the statute is to secure a verification of the claim; and, when the claim is verified, we do not feel satisfied that the failure to state in the affidavit that the person who made it was the agent or attorney of the claimant should cast upon the latter the burden of the costs in cases like this, where the executor without making any objection to the verification tenders an issue on the claim and after trial demands, for the first time, that costs be taxed against the claimant. But as the case, so far as concerns the matter of costs, must go off on another point we leave the question undecided.

It will be observed that the claim was not verified until some time after it was filed, and the question is presented whether this verification will save costs to the claimant. The provision of the statute is, "Unless such statement, when filed, shall be accompanied by the affidavit of the claimant, his agent or attorney, that the claim, after deducting all credits to which the estate is entitled, is justly due and wholly unpaid, the claimant shall be bound for all costs in the prosecution of the claim." R. S. 1881, section 2310. This language is imperative and is unusually strong. It expresses a command that the claim shall be verified "when filed," and the penalty prescribed for a disobedience of this command is that the claimant shall be "bound for all costs in the prosecution of the claim." There is no room for construction, and there is but one meaning that can be assigned to the language of the statute, and that meaning is, that the claim must be verified "when filed," or "all costs of prosecuting the claim"

must be paid by the claimant. The provision does not, as those of former statutes did, prohibit the claimant from recovering costs, but it declares that he shall pay costs. Nor does it stop short of all costs, for the language is as comprehensive as could well be employed. The decisions made under former statutes can not be accepted as guides under the provision of the present, for the reason that its terms are essentially different.

For the error in overruling the motion to tax costs the judgment must be reversed.

It is accordingly ordered, that the judgment be reversed and the cause remanded with instructions to sustain appellant's motion to tax costs.

Filed May 14, 1884.

95 387
168 475

No. 11,030.

POLAND *v.* MILLER ET AL.

WARRANTY.—*Breach of.—Complaint.*—A complaint for breach of warranty of the soundness of personal property sold is good without alleging that its defects were not open and visible.

SAME.—*Manufacture and Sale.*—The manufacture and sale of an article for a particular use implies a warranty that it is reasonably fit for that use, visible defects excepted, and the manufacturer is liable for such damages as result from a breach of the warranty, e. g., whiskey barrels, which by reason of defective material or cooperage, lose their contents.

SAME.—*Damages.—Negligence.*—One who buys whiskey barrels of a manufacturer for the purpose of storing whiskey therein, with express warranty that they are fit for that purpose, and, without negligence, believing they are fit for the purpose, so used them, and by reason of defects loses the contents, may recover therefor in a suit for breach of warranty.

SAME.—*Instruction.*—In such case it is not error to refuse to instruct that if the plaintiff's negligence contributed to his loss he can not recover.

PLEADING.— *Practice.*—If one of several paragraphs of a complaint be good, there is no error in overruling a demurrer to the whole complaint.

INSTRUCTION.—*Harmless Error.*—An instruction which is not correct, but can not possibly mislead when applied to the evidence of the particular case, is harmless.

SAME.—*Set-Off.*—An instruction that if the jury find for the plaintiff, after ascertaining the plaintiff's damages, an admitted set-off shall be deducted therefrom is harmless in a case where the plaintiff's damages are assessed at a sum greater than the set-off.

SAME.—An instruction that if the jury believe that the facts averred, etc., are true, they must find for the plaintiff, so clearly implies that the belief must be founded on the evidence, that it is unobjectionable.

From the Shelby Circuit Court.

J. B. McFadden and *B. F. Love*, for appellant.

T. B. Adams and *L. T. Michener*, for appellees.

BEST, C.—The appellees brought this action to recover such damages as they had sustained by reason of an alleged breach of warranty in the sale of a number of barrels manufactured and sold by the appellant to them for the purpose of holding and storing whiskey.

The complaint consisted of two paragraphs. The first averred, in substance, that the appellant was engaged in manufacturing tight barrels, suitable for holding and storing whiskey, and for such purpose sold the appellees, who were engaged in its manufacture, a large number; that among these, twenty-five were defective, unsound and so unskilfully made as to be unfit for such use; that the appellees, without knowledge of their defective condition and in the belief that they were sound and suitable, filled all of them with whiskey and stored them away; that immediately thereafter they paid the government a revenue tax of ninety cents upon each gallon placed in them, and that afterwards, without their fault, three hundred and ten gallons of said whiskey, of the value of $1.90 per gallon, leaked from said barrels and was lost, to their damages, etc.

The second paragraph avers the same facts as the first, except it is alleged that the appellant expressly warranted said barrels to be suitable for the purpose for which they were made and sold.

A demurrer to each paragraph of the complaint was overruled; an answer in denial and a set-off were filed. A reply

completed the issues, which were tried by a jury and a verdict for $200 less $48 was returned for the appellees, upon which, over a motion for a new trial, judgment was rendered. The rulings assigned as error are that the court erred in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

The only objection urged to the second paragraph of the complaint is that it is not averred that the defects were not open and notorious. This was unnecessary, as such warranty does not embrace such defects. This would seem to be matter of defence. The approved forms do not contain such averment, and we think the law does not require it. 1 Estee Pl., p. 550; Iglehart P. &. P., p. 543; *Page* v. *Ford*, 12 Ind. 46.

The second paragraph being sufficient, the assignment that the court erred in overruling the demurrer to the complaint can not be sustained, however faulty the first may be, and, therefore, as an examination of the various objections made to the first is useless, we pass them, though we think none of them are well taken.

The motion for a new trial embraces several questions which will be considered in the order of their discussion.

It is first insisted that the evidence was not sufficient to sustain the verdict. This conclusion is thus reached: The price paid for the defective barrels exceeded their value, but the difference did not equal the damages assessed and the excess must rest upon the quantity of whiskey lost and revenue paid. If not entitled to recover for the loss of the whiskey the amount of the recovery was too large, and hence the appellant insists that the evidence is not sufficient to support the verdict.

The evidence tended to show that the appellees knew when they put the whiskey into the barrels that some of them were unfit for use, and the appellant insists that the appellees were therefore guilty of culpable negligence in using the barrels, and hence they must sustain such loss as their use occasioned.

The loss, if any, sustained by the use of barrels which the appellees knew were unfit, must be borne by them, but the mere fact that they knew that some of them were unfit did not necessarily render them negligent in using the remainder. Whether or not their use, under the circumstances, was negligence, was a question of fact. The evidence shows that three or four of the barrels, when the whiskey was put into them, leaked so badly as to be unfit for use, and from these the whiskey was emptied and the barrels discarded. A number of the other barrels also leaked, more or less, but the leakage was stopped, and these, with a large number of others that did not then leak—in all more than 200—were filled and placed in a bonded warehouse for storage. From time to time, these barrels were examined, and such as were found leaking were either removed or the leakage stopped; but notwithstanding the care thus bestowed, the evidence tended to show that during the year that those barrels were stored, more than 300 gallons of the whiskey was lost. The evidence also tended to show that barrels which were apparently tight and suitable when the whiskey was placed in them were afterwards found leaking—some in consequence of defective materials and others probably in consequence of unskilful cooperage. The fact that the barrels were unfit for the purpose for which they were made is not much controverted, and whether or not the appellees were negligent in storing their whiskey in them was a question of fact which, for aught that we can discover, was properly submitted to and determined by the jury. We, therefore, can not disturb the verdict upon this question.

The court instructed the jury that "A party who sells an article undertakes that such article is a good and merchantable article, and fit and suitable for the use for which it is intended, and is responsible for any damages resulting from any defect therein," except such defects as are obvious, and except such damages as arise from the use of an article obviously unfit for the purpose for which it is used. This charge

is not correct as an abstract proposition, but as applicable to this case it states the law correctly. The appellant was engaged in manufacturing these barrels, and he does not dispute his alleged undertaking of manufacturing them for the purpose of enabling the appellees to store their whiskey in them. A sale thus made by a manufacturer carries with it an implied warranty that the article is reasonably fit for the purpose for which it was manufactured, and if it is not, the manufacturer is liable for the damages caused by the breach of his contract.

The parties agreed that the appellees owed the appellant $48 on the set-off pleaded, and the court instructed the jury that if they should find for the appellees, they should assess their damages and deduct therefrom the $48.

This charge was correct in view of the damages assessed. If the appellant apprehended that the jury would, in the event that they found for the appellees, assess their damages at less than $48, they should have prepared an instruction applicable to such contingency.

It is also insisted that the first and third charges imply that the appellees may recover though the defects in the barrels were open and palpable, but an examination of them leads us to the conclusion that they are not faulty in this respect.

The court instructed the jury that "if they believed the facts averred," they should find for the appellees, and it is insisted that this was wrong, because the court did not also say that their belief must be founded on the evidence. This was understood and it was unnecessary to express it.

The court also instructed the jury that if the appellant warranted the barrels to be suitable for storing whiskey, and the appellees filled them in the belief that they were reasonably suitable for such purpose, and without gross negligence, etc., they could recover. This means, as we suppose, that if the appellees, without gross negligence, believed that the barrels were suitable and filled them, they could recover. This

was not erroneous. They had the right to rely upon the warranty, which the evidence shows was an express one.

The appellant requested the court to instruct the jury that if the appellees' negligence contributed to their loss, they could not recover. This was properly refused. The action was brought for breach of warranty in delivering defective barrels, and such damages as the appellees sustained by reason of this breach they were entitled to recover, though their negligence contributed to the loss of their whiskey.

The appellant also asked the court to instruct the jury that if the appellees knew the barrels were leaking, and could by reasonable diligence and care have prevented it, and did not, they could not recover for any loss by leakage thereafter. This was substantially given by the court in its second charge and there was, therefore, no error in its refusal.

This disposes of all the questions discussed, and as no error appears in the record, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered that the judgment be affirmed, at the appellant's costs.

Filed May 10, 1884.

No. 9260.

95 302
185 49

BOYD, TRUSTEE, *v.* CALDWELL.

STATUTE OF LIMITATIONS.—*Action to Set Aside Trustee's Final Report.—Decedents' Estates.*—In an action to set aside, as fraudulent, the final report of one who, under a will, had been appointed by a probate court to execute a trust created by the will, it is no defence to set up the three years' statute of limitations governing such actions against administrators, executors or guardians.

SAME.—*Amendment of Complaint, Changing Parties and Nature of Action.*—There is no error in permitting the relator in an action by the State, on a trustee's bond, against the trustee and his sureties, to so amend his complaint as to make it an action by the relator as plaintiff, against the trustee alone, to set aside, as fraudulent, the defendant's final report.

From the Henry Circuit Court.

J. H. Mellett, E. H. Bundy, W. Grose, J. C. Denny and *W. L. Granger*, for appellant.

F. J. Hall, C. E. Barrett, J. C. Briggs, — Brown and *— Warner*, for appellee.

HAMMOND, J.—Eli Davis died testate, July 19th, 1871. His will, which was duly admitted to probate, directed $20,000 to be set apart in trust, the interest of which was to be used for the maintenance of the testator's son Clinton, during his life. The will provided that the trust should be committed to the charge of the testator's administrator or such trustee or trustees as the court having probate jurisdiction might appoint. The appellee, on June 24th, 1872, was appointed such trustee, and gave bond and acted in that capacity to October 6th, 1875, when he resigned. On the 26th of the following January he filed his final report as such trustee, which was examined and approved by the court. Martin L. Bundy first, and, after him, the appellant succeeded to the trust. On January 26th, 1879, the appellant as relator in the name of the State brought an action against Caldwell and his sureties on his bond as such trustee, alleging in his complaint that Caldwell had misappropriated trust funds to the amount of $4,000. Afterward, on November 20th, 1879, the case was dismissed as to the sureties, and an amended complaint, spoken of in the record as the second amended complaint, was filed, in which the State was omitted as a party, and the appellant named as plaintiff. With this amended complaint, exhibits were filed of the partial and final reports of Caldwell as trustee, which were asked to be set aside as fraudulent, and judgment was prayed in the sum of $5,000 for the use of the trust estate, on account of Caldwell's alleged malfeasances while acting as such trustee.

The appellee answered, in substance, that more than three years had passed between the date of Caldwell's final settlement and discharge, and the date of the filing of the plaintiff's second amended complaint.

The appellant demurred to the answer for the want of facts, but his demurrer was overruled. He excepted to the ruling, and assigns the same for error in this court.

In support of the sufficiency of the answer, the learned counsel for the appellee insist, with much force and ability, that section 116 of the decedents' act of 1852, 2 R. S. 1876, p. 537, which was in force when this case was pending in the court below, applies to this action, and requires that the same should have been brought within three years after the filing of the final report referred to. The above section of the statute relied upon, provided that the final settlement of an estate by an executor or administrator might be set aside for mistake or fraud at any time within three years after the same was made. There is nothing in this statute or any other extending its provisions to estates under the charge of persons specifically designated as trustees. Our statutes, sections 2969–3000, R. S. 1881, upon the subject of trusts and powers, contain only general directions as to the management of such estates. These estates, however, have always been under the control and supervision of courts of equity, and such control and supervision are clearly recognized by statute as belonging solely to the equitable jurisdiction of our courts. Sections 2978, 2979, 2980, 2988, 2989, 2995, 2996 and 2997, R. S. 1881; *Hinds* v. *Hinds*, 85 Ind. 312.

The fact that the will of Davis vested the power of appointing a trustee in a court having probate jurisdiction, did not divest the equitable jurisdiction of the court over the trust. The circuit court, which has exclusive probate jurisdiction, has also general chancery jurisdiction, and this jurisdiction is amply sufficient for the protection of trust estates. In requiring accounts from the trustee, the court might, or might not, at its pleasure, adopt the practice pertaining to the settlement of decedents' estates, or the estates of those under guardianship. The reports of the trustee made under the order of, and approved by, the court, no doubt furnish *prima facie* evidence of their correctness, and, in the absence of

proof of fraud or mistake, will stand as a shield of protection to the trustee. But they are not conclusively correct, and may be set aside on the ground of fraud or mistake in an action for that purpose alone, or in an action having also for its object the recovery of trust funds not legally accounted for. *Ferguson* v. *State, ex rel.*, 90 Ind. 38.

Counsel for the appellee refer us to the case of *State, ex rel.*, v. *Hughes*, 15 Ind. 104. That was an action on a guardian's bond, commenced more than three years after the final settlement. It was held that section 116, *supra*, of the decedents' act of 1852 applied, and that the action was begun too late. But that decision was based upon section 13 of the guardians' act (section 2527, R. S. 1881), which provides that a suit upon a guardian's bond "shall be governed by the law regulating suits on the bonds of executors and administrators." No similar provision is found in the statutes relating to trusts.

Our conclusion is that section 116, *supra*, was not applicable to this case. As there is no statute, directly or by implication, limiting the commencement of an action against a trustee to a period of three years after his final report and discharge, the appellant's demurrer to the answer should have been sustained.

The second amended complaint was filed over the appellee's objection, and his motion to reject the same was overruled. To these rulings proper exceptions were taken, and the same are assigned by the appellee as cross errors. We are of opinion that under the liberal provisions of the statute respecting amendments of pleadings, no error was committed by the court in the rulings complained of by the appellee. Section 394, R. S. 1881.

For the error in overruling the appellant's demurrer to the appellee's answer the judgment will have to be reversed.

Judgment reversed, at appellee's costs, with instructions to the court to overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

Filed March 7, 1884; petition for a rehearing overruled May 15, 1884.

No. 11,288.

STRANGE, ADMINISTRATOR, *v.* TYLER.

PRACTICE.—*Motion to Modify Judgment.*—A motion to modify a judgment, on the ground that the evidence did not authorize it, can not be sustained.

From the Grant Circuit Court.

J. A. Strange, J. A. Kersey and *L. D. Baldwin*, for appellant.

I. VanDevanter, J. W. Lacey and *W. VanDevanter*, for appellee.

COLERICK, C.—The appellee brought an action to enjoin the appellant from collecting certain judgments that had been rendered against the appellee and Absalom Thomasson, and to have the same declared satisfied. It was averred in the complaint therein that the appellant, as administrator of the estate of said Thomasson, was endeavoring to collect, by executions, said judgments of the appellee, upon the alleged ground that the same had been paid by Thomasson, in his lifetime, as the surety of the appellee. The action was tried at the April term, 1882, of the Grant Circuit Court, and resulted in the rendition of a judgment in favor of the appellee, perpetually enjoining the collection of the judgments from him and declaring them satisfied as to him. The appellant made an application to the court, at its November term, 1882, by motion, in writing, to modify the judgment so rendered in favor of the appellee. The motion was rejected by the court, and this ruling is the only error assigned.

It was claimed by the appellant, in support of his motion, and recited therein, that the judgment, in part, was founded upon the second paragraph of the complaint in said action, although the evidence which had been introduced on the trial, in support thereof, was stricken out by the court. By reason of that fact he insisted that the judgment should be modified so as to show that it was not rendered upon that paragraph of the complaint.

It is not claimed by the appellant that the judgment was incorrectly entered. He merely insists that the judgment, so far as it was based upon the second paragraph of the complaint, was rendered in the absence of evidence supporting it. This fact, if true, would, probably, have been a sufficient cause for the granting of a new trial, but the court below, on a motion like this, could not review its former finding and judgment as to any question of fact decided, as relief from such error can only be had on appeal. See *Hannah* v. *Dorrell*, 73 Ind. 465. The motion was properly rejected by the court.

PER CURIAM.—The judgment is affirmed, at the costs of the appellant.

Filed May 10, 1884.

No. 11,102.

REID *v.* MITCHELL.

REAL ESTATE, ACTION TO RECOVER.—*Description.—Complaint.—Assignment of Error.—Defects Cured.—Amendment.—Supreme Court.—Presumption.*—Where, in an action affecting real estate, the description set out in the complaint is such as might have been amended in the trial court, and might have been made good by the evidence, the Supreme Court will presume in favor of the verdict, where the question as to such description is first made by an assignment of error attacking the complaint.

From the Lawrence Circuit Court.

S. D. Luckett and *W. H. Martin*, for appellant.

M. F. Dunn and *G. G. Dunn*, for appellee.

ELLIOTT, J.—The complaint of the appellee is assailed by the assignment of errors for the first time, and the assault is sought to be made successful on the ground that the description of the real estate of which the appellee demands possession is insufficient.

Many defects in a complaint or declaration, which would be available on a demurrer, are cured by a verdict. The general rule upon this subject was thus stated in *Shimer*

v. *Bronnenburg*, 18 Ind. 363: "After verdict the court will support the declaration by every legal intendment, if there is nothing material on record to prevent it. Where a fact must necessarily have been proved at a trial to justify the verdict, and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof." This doctrine has often been declared and enforced by this court. *Jones* v. *White*, 90 Ind. 255; *Clegg* v. *Waterbury*, 88 Ind. 21; *Puett* v. *Beard*, 86 Ind. 104; *Parker* v. *Clayton*, 72 Ind. 307, and authorities cited. This general doctrine has been applied to matters of description. *Alford* v. *Baker*, 53 Ind. 279. In the case just cited it was said by WORDEN, C. J., in speaking of the description of the property, that "This is sufficient to let in proof which might render the identity of the property more certain."

In our opinion the general rule of which we have been speaking should apply to cases of defective descriptions. It certainly would be productive of great injustice to lay down a rule which would permit a defendant (as was done in this case) to go through two trials without suggesting any objection to the complaint, and then, for the first time, on appeal from the judgment on the last trial attack the complaint by the assignment of errors. We do not mean to hold that where the description is wholly insufficient, or so uncertain as not to be susceptible of correction by evidence that might have been given, under the general scope and theory of the case made by the complaint, the defect will not be available after verdict; but we do hold, that where the description is such as might have been corrected by evidence admissible under the general scope of the complaint, the defective description will be deemed healed by the verdict. We are, therefore, to ascertain whether the description set forth in the complaint is such as might have been made definite and certain by evidence which could have been given under the general scope of the complaint.

The point made by the appellant is thus exhibited in his brief: "The only question we present to the court is whether the complaint complies with the requirement of the statute. It gives a very particular and accurate description of a tract of land in Lawrence county, Indiana, said to contain 113½ acres, less all that part of the east half of the northwest quarter of section eight, town. five north, of range one east, deeded to Samuel McKnight. It is this exception that vitiates the description, in our opinion." We can not yield assent to this argument. It seems to us that the description might have been made perfectly accurate and definite by evidence showing what part was conveyed to McKnight. We see no reason why the complaint might not have been so amended below as to show what land the McKnight deed embraced. Sedgwick & Wait Trial of Title to Land, section 464.

If the pleading could have been amended in the trial court, then the settled rule requires us to treat it as amended here. But however this may be, we feel quite sure that the imperfections in the description might have been remedied by evidence competent under the general scope of the complaint, and under the general rule we have stated the intendment is that such evidence was given.

It is by no means clear that the description is in itself so uncertain as to be void. The general rule is, "that is sufficiently certain which can be made certain," and here the means of making the description certain are supplied by the description itself. Counsel for appellant cite from 1 Works Pr., section 390, the following: "There must be such a description of the property, to constitute a cause of action, that the sheriff, with the assistance of a surveyor, can find the real estate and determine its boundaries." We think this could readily be done in the present case by ascertaining what was conveyed to McKnight, for as soon as this was ascertained, then the boundaries of the land claimed by the appellee become fully known, for all the residue of the tract, which is very fully and accurately described, belongs to him.

In the case of *White* v. *Hyatt*, 40 Ind. 385, there was no description of the land except this: "A part of the N. E. $\frac{1}{4}$ of section 19, township 7, range 12 east, containing $97\frac{17}{25}$ acres; also a part of the south-west quarter of section 18, township 7, range 12 east, containing about 33 acres; being the same lands this day deeded by said Hyatt * * to said White, and being more fully described in said deed," and the court held that this description was insufficient on objection made to introduction of evidence, but said: "If the deed referred to in the mortgage, as containing a more perfect description of the premises, had been made part of the complaint, or if the correct description had been set out in the complaint, doubtless proper evidence would have been admissible to render the description certain, for that is regarded as certain which is capable of being rendered certain." Conceding the correctness of the ruling in the case cited, it is not in favor of appellant's contention, for the reason that as the question is presented in this case we must presume that the evidence which the court says would have cured the defective description was introduced. But the case in hand differs from that cited in another essential particular, and that is this, the present complaint does contain a full and accurate description of land and is only defective in failing to specifically describe the excepted parcel described in McKnight's deed. The description of the land in *Struble* v. *Neighbert*, 41 Ind. 344, was more imperfect than that in the case cited, and yet the court said: "With proper averments in the complaint, undoubtedly it can be made good." If a description can be made good, then the intendment which the rule we have given requires us to make, supplies it after verdict.

It was held in *Brown* v. *Anderson*, 90 Ind. 93, that "A description of lands in a complaint for possession is sufficient if, by the aid of a competent surveyor and persons knowing the location of monuments mentioned as points in the boundaries, the lands can be found." This we think a just and reasonable rule. The old rule, that the description in eject-

ment must be so definite as to enable the sheriff, without suggestion, information or assistance, to locate the land, was long since overthrown. Sedgwick & Wait Trial of Title to Land, section 455.

In *Barclay* v. *Howell*, 6 Peters, 498, a more liberal rule than that we have stated was adopted and enforced. The description of the land in *Flanigen* v. *City of Philadelphia*, 51 Pa. St. 491, was by the street numbers, and it was held sufficient. In *English* v. *Roche*, 6 Ind. 62, it was said, in speaking of a complaint to foreclose a mortgage, that "The description is sufficient whenever the land intended to be mortgaged can be ascertained by it." The court, in the course of its opinion in *Whittelsey* v. *Beall*, 5 Blackf. 143, said: "It was formerly considered an established principle, that the description of lands in an action of ejectment must be so certain as to enable the sheriff exactly to know, without any information from the lessor of the plaintiff, of what to deliver possession. That maxim has been abolished, and it is now the practice for the sheriff to deliver possession of the premises recovered in that action, according to the directions of the claimant, who therein acts at his own peril." It will be seen that the case cited lays down a very liberal rule, perhaps too liberal under the provisions of our code, but at all events it certainly does not sustain the appellant's contention. The question in *Hammond* v. *Stoy* 85 Ind. 457, arose on a motion to make the complaint more specific, and that case is very plainly not in point here. In *Halstead* v. *Board, etc.*, 56 Ind. 363, it was said: "But where there is such a description in the mortgage as will render it operative to convey the property to the mortgagee, but not so definite as to enable a third person, in making sale of the property, (an officer for example,) to specify the exact boundaries, in such case, if the complaint upon the mortgage alleges the true boundaries, the complaint will be good; * * * and, upon such proof, the court, in its decree, may specify the true boundaries, and the officer may sell and convey accord-

ingly." The cases of *Allen* v. *Shannon*, 74 Ind. 164, and *Bowen* v. *Wood*, 35 Ind. 268, state the rule even more broadly, and they cite many cases sustaining their doctrine, and they are in harmony with the recent case of *Meikel* v. *Greene*, 94 Ind. 344. The case of *College Corner, etc., G. R. Co.* v. *Moss*, 92 Ind. 119, is probably well decided as to the precise point involved, but some of the illustrations and arguments may, perhaps, require qualification. We do not decide that such a description as the one embodied in the present complaint would be good on motion to make the complaint more specific, nor on demurrer to the complaint, but simply decide that the complaint is good as against the attack here made.

Judgment affirmed.

Filed May 15, 1884.

No. 10,953.

HUDSON ET AL. *v.* WELLS.

From the Jackson Circuit Court.

A. P. Charles, F. Emmerson and *B. H. Burrell*, for appellants.

W. K. Marshall, R. Applewhite and *M. H. Owen*, for appellee.

BICKNELL, C. C.—Hudson & Cummings brought this suit against Wells to quiet their title to land, and to procure satisfaction of a mortgage thereon, held by Wells.

The complaint stated that John Fish mortgaged the land to Wells, and then conveyed it to Browning, who paid the mortgage debt and conveyed the land to the plaintiffs, and that Wells claims that the mortgage is still a lien and threatens to enforce it. Wherefore, etc.

Wells answered by a general denial, and filed a cross complaint, making Fish, the mortgagor, a defendant, and praying for a personal judgment against Fish for the mortgage debt and for foreclosure as to all the parties.

Fish appeared, and he and the plaintiffs filed a joint answer to the cross complaint in five paragraphs, to which Wells replied in denial. No question arises on the pleadings.

The cause was tried by the court, who found for the defendant on the complaint and on the cross complaint, and rendered judgment against Fish for the amount of the mortgage debt, and against the plaintiffs and Fish for foreclosure.

Hudson & Cummings moved for a new trial as to the complaint, and they and Fish jointly moved for a new trial as to the cross complaint.

These motions were overruled, and the plaintiffs and Fish appealed.

The only errors assigned are that the court erred in overruling the motions for a new trial. The only reasons for a new trial are, that the findings and judgments are not sustained by sufficient evidence, and are contrary to the law and the evidence.

The controlling question is, was Wells indebted to Browning? The appellants claim that if Wells was indebted to Browning, the amount of that indebtedness ought to be offset against the mortgage debt, and they claim that the evidence shows that Wells was so indebted, and that by agreement of the parties, such indebtedness was to be credited on the mortgage debt as a full payment of it. The appellants say in their brief: "The preponderance of the evidence is clear, that at the time above stated, there was due from Dr. Wells to Browning a balance of over $600," and again they say, "We think that the preponderance of the evidence shows that * * * Dr. Wells and Browning met and had a conversation together, in which it was mutually agreed between them that the amount of the mortgage should be credited upon the indebtedness of Wells to Browning." But the finddings show that the court below came to a different opinion.

Where the evidence is conflicting, this court can not disturb the finding on the weight of the evidence. *Harring* v. *Nowlin*, 90 Ind. 601; *Baldwin* v. *Fleming*, 90 Ind. 177.

The judgment therefore must be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed May 14, 1884.

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No. 11,006.

PRATT ET AL. *v.* ALLEN.

SUPREME COURT.—*Evidence Excluded.—New Trial.—Practice.*—Where alleged error in the exclusion of evidence is not made a cause in a motion for a new trial, it can not be considered by the Supreme Court on appeal.

SAME.—*Pleading Rejected.—Bill of Exceptions.*—Error in refusing a pleading offered must be made part of the record by a bill of exceptions.

SAME.—*Time of Filing.—Record.*—To constitute a bill of exceptions part of the record, it must affirmatively appear by the record that the bill of exceptions, filed after the term, was filed within the time fixed by the court.

SAME.—*Brief.*—See opinion for a brief held not to comply with the rule of the Supreme Court.

From the Rush Circuit Court.

J. Q. Thomas, *J. J. Spann* and *J. W. Study*, for appellants.

W. A. Cullen and *B. L. Smith*, for appellee.

ZOLLARS, J.—Appellants complain of the rulings of the court below in excluding evidence offered by them under a plea in abatement, and in refusing them leave to file an answer in bar.

These questions are not before us for decision, for more than one reason.

First. The exclusion of the evidence, if error, was an error which occurred during the trial, and the question of such exclusion should have been presented to the court below as a cause for a new trial. We can not know that it was so presented, or decide that the court erred in overruling the motion for a new trial, because there is no such motion in the record.

Second. We have no way of knowing the character of any offered plea in bar, that any was offered, or that the court below refused to allow any plea to be filed, because these matters could only be preserved and brought into the record by a bill of exceptions, and there is no such bill properly in the record.

The record shows that time was given in which to file a bill of exceptions. The signature of the judge to what purports to be a bill of exceptions indicates that he signed it within the time. It is copied into the transcript, but there is nothing in any way to show or indicate when the bill was filed, or that it was ever filed. A bill of exceptions, to become a part of the record, must be filed within the time given by the court, and the record must affirmatively show such filing. *Loy* v. *Loy*, 90 Ind. 404; *Dunn* v. *Hubble*, 81 Ind. 489; *Stivers* v. *McConnell*, 39 Ind. 240.

Third. Appellants' brief is not a compliance with the rule in relation to briefs. After a statement of the two alleged errors, without any reference to the pages of the record, counsel say, they are of the opinion that in the exclusion of the offered evidence, and the refusal of leave to file the plea in bar, the court below erred. No reasons are stated nor authorities cited. See *Powers* v. *State*, 87 Ind. 144; *Millikan* v. *State*, *ex rel.*, 70 Ind. 283; *Wilson* v. *Holloway*, 70 Ind. 407; *City of Anderson* v. *Neal*, 88 Ind. 317; *Gardner* v. *Stover*, 43 Ind. 356; *Deford* v. *Urbain*, 42 Ind. 476; *Parker* v. *Hastings*, 12 Ind. 654; *McCann* v. *Rodifer*, 90 Ind. 602; Works Pr., sec. 1098.

Fourth. The pages of the record are not numbered, nor are there marginal notes, as required by rule 19 of this Court.

The judgment is affirmed, with costs.

Filed May 15, 1884.

No. 11,417.

FORKNER *v.* THE STATE.

INTOXICATING LIQUOR.—*Bartering Liquor with Minor for Pool Check.—Presumption of Value.*—An affidavit charging the defendant with bartering one pint of intoxicating liquor to a minor for a pool check is sufficient without alleging either the value of such check or that it was an article of value.

From the Wayne Circuit Court.

T. W. Bennett, for appellant.

F. T. Hord, Attorney General, *C. E. Shively*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a prosecution under section 2094, R. S. 1881, for bartering intoxicating liquor to a minor, and was based upon an affidavit made before, and filed with, the mayor of the city of Richmond.

The affidavit charged that George A. Forkner, the appellant, on the 6th day of October, 1883, at the county of Wayne, in this State, unlawfully bartered to one William F. Bishop, a person under the age of twenty-one years, for a certain pool check, intoxicating liquor in a less quantity than a quart, that is to say, one pint of beer.

Upon an appeal to the circuit court, a motion to quash the affidavit was overruled, and a trial resulted in a verdict of guilty, and in the assessment of a fine of $20 against the appellant. A motion for a new trial, challenging the sufficiency of the evidence, was denied, and judgment rendered on the verdict.

It is first insisted that the affidavit was fatally defective, because of its failure to aver the value of the pool check, or that it was an article of value.

The exchange of one article for another is a barter, but the question of price does not necessarily enter into the transaction, and in that respect a barter differs from a sale.

It is true, as contended, that the act of transferring a com-

modity without a valuable consideration constitutes a gift only, and hence neither a sale nor a barter. Story Sales, 1; Benj. Sales, 2. But the exchange of one article for another imports a consideration, and the burden of establishing that there was no consideration devolves upon him who asserts that there was not; consequently, the charge in this case that the appellant bartered a pint of beer to the prosecuting witness for a certain pool check carried with it the inference that the pool check had some value, either general or special, and cast the burden of showing the contrary upon the appellant. Such an attempted showing on his part would have been the equivalent simply of an assertion that there had been no such barter as that charged. We are, therefore, unable to see any objection to the sufficiency of the affidavit.

It is insisted in the next place that there was no evidence tending to prove that Bishop, the prosecuting witness, was under twenty-one years of age, but we do not so construe the evidence.

Owing to some abbreviations in the bill of exceptions there is some obscurity in the testimony of Bishop as to his age, but we infer from the reported synopsis of his testimony that he meant to say, and was understood as saying, that he was between sixteen and seventeen years old at the time of the trial.

Two other witnesses, who had seen Bishop previous to the trial, gave it as their opinion that his age did not exceed eighteen years. There was other evidence tending to show that he was in appearance over twenty-one years of age. The probable age of the prosecuting witness became in this way a question for the jury, and the record presents nothing from which we can infer that the verdict in respect to that question was not sustained by sufficient evidence.

The judgment is affirmed, with costs.

Filed May 15, 1884.

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No. 10,109.

WRIGHT ET AL. *v.* WILSON.

DRAINAGE.—*Petition.*—*Description.*—A petition for drainage under the act of March 9th, 1875, was only required to describe *generally* the starting point, route and terminus of the work proposed. It need not be particular or exact.

SAME.—*Practice.*—*Supreme Court.*—In such case a motion to dismiss the petition, based on facts found by the court to be untrue, can not be considered by the Supreme Court.

SAME.—*Appeal.*—*Jurisdiction of Circuit Court.*—*County Commissioners.*—On appeal to the circuit court in such cases, its jurisdiction is not affected by the fact that the order of the county board appealed from was entered at a time when the board had no power to act upon the matter.

SAME.—*Parties.*—One, through whose lands the drain will run, must be a party to the proceedings by notice or otherwise, and unless this appear on the trial the whole proceeding must fail.

From the Cass Circuit Court.

D. D. Dykeman, *M. Winfield* and *Q. A. Myers*, for appellants.

R. Magee and *D. B. McConnell*, for appellee.

BEST, C.—The appellee instituted these proceedings before the commissioners of Cass county, to establish a ditch under the provisions of the act of March 9th, 1875. The commissioners of said county, on the 9th day of September, 1879, appointed viewers who made their report on the 18th day of said month and on the 20th day of October thereafter, the appellant Williamson Wright appeared before said commissioners and remonstrated against the establishment of such ditch. The cause was then set for trial on the 22d day of said month, when said appellant withdrew his remonstrance and consented to the establishment of such ditch, which was then accordingly done. Thereafter said Wright and the other appellants, the latter not having appeared before the commissioners, appealed from the order made by the board to the Cass Circuit Court and there moved to dismiss the case on the ground, among others, that the description of the ditch was

insufficient, and that the petition did not state facts sufficient to constitute a cause of action. This motion and a like motion by the appellants, other than Wright, were overruled, a trial had and a verdict with answers to interrogatories was returned for the appellee, upon which, over a motion for a new trial and in arrest of judgment, final judgment was rendered upon the verdict. These rulings have been assigned as error and will be considered in the order of their statement.

The ditch sought to be established was in Cass county, and in the petition it was thus described: "Beginning at a point indicated by a stake on the east side of the C. C. & I. C. railroad, and bearing east about twenty-seven rods from the southwest corner of the northwest quarter of the northeast quarter of section number eight, township twenty-five north, of range three east; thence northwest parallel to the line of said railroad through the northwest quarter of the northwest quarter of said section eight; thence through the northeast part of the northeast quarter of section seven, same township and range, being the land owned by your petitioner; thence through the northeast part of the southeast quarter of section number six, owned by Isaac Benngamer, to the intersection of the old channel at the north side of a pond, thence northwest with curves in channel to west side of the culvert under said railroad to the point of outlet, bearing southeast from the northwest corner of the southeast quarter of said section number six, same township and range as aforesaid, where the same terminates at said culvert."

The second section of the above named act only requires a petition for the establishment of a ditch to contain "a general description of the proposed starting point, route and terminus," and we think in this respect this petition is sufficient. It gives the starting point, route and terminus. The starting point is at a stake on the east side of the railroad about twenty-seven rods from the southwest corner of the northwest quarter of the northwest quarter of section eight,

etc., the route is parallel with the railroad in a northwest direction through several parcels of land described, to an old channel in the northeast part of the southeast quarter of section six; thence with the channel to the west side of the culvert under said railroad in said quarter section. This description is quite general, especially that portion describing the route, but as the statute does not require an accurate description we think this sufficient in this respect. *Milligan* v. *State, ex rel.*, 60 Ind. 206; *Corey* v. *Swagger*, 74 Ind. 211; *Coolman* v. *Fleming*, 82 Ind. 117.

The petition has not been assailed in any other respect, and, therefore, we assume that the facts averred constituted a cause of action under this statute.

All the other reasons assigned for the dismissal of the action were dependent upon facts not apparent of record, and as these were not found to be true by the court, we can not say whether the court disregarded them because not true in fact, or not sufficient in law. In this condition of the record its ruling does not appear erroneous. These motions were, therefore, properly overruled.

It appears from the record that the board of commissioners established the ditch at its October meeting, in 1879, when it was convened for the purpose of receiving the reports of the school trustees, and, as this was not a regular meeting, and was not specially called to consider the establishment of this ditch, the appellant contends that the board had no power to make the order, and hence that the circuit court acquired no jurisdiction of the subject-matter, and, therefore, the appellants' motion in arrest of judgment should have been sustained. This position proceeds upon the notion that an order thus made was a mere nullity; that the appeal simply operated to vacate it, and that the proceedings were thereby discontinued or remained pending before the commissioners. We think otherwise. If the board of commissioners had jurisdiction, the mere fact that it made an order establishing the ditch at an

unauthorized time did not prevent the circuit court from acquiring jurisdiction by appeal. The appeal vacated the order and transferred the proceeding to the circuit court, where it stood for trial *de novo*, however many errors may have been committed before the board of commissioners, and without reference to their character. *Britton* v. *Fox*, 39 Ind. 369; *State, ex rel.*, v. *Brewer*, 64 Ind. 131; *Corey* v. *Swagger*, *supra*. The motion in arrest was properly overruled.

This brings us to the motion for a new trial, which embraced many reasons. Some of these will now be noticed. The evidence tended to show that the greater portion of the ditch in question was located upon the right of way of the Columbus, Chicago and Indiana Central Railway Company, then leased to, and used by, the Pittsburgh, Cincinnati and St. Louis Railway Company, and it was agreed by the parties, as a part of the evidence, that neither of said companies had been in any way made a party to this suit. At the proper time the appellants requested the court to submit an interrogatory to the jury asking them whether or not a portion of the ditch was not located upon the right of way of said company; and also asked the court to instruct the jury that if they found that the greater portion of said ditch was located upon the right of way of said company, and that neither of said companies had been made a party to the proceedings by notice or otherwise, then their verdict should be for the defendants. These requests were refused, and appellants insist that these rulings were wrong.

The second section of the statute, under which this proceeding was instituted, authorizes the board of commissioners to establish any ditch upon the petition of any one or more land-owners, whose lands will be affected by its establishment, and requires them to appoint viewers who shall make a computation of the number of cubic yards of earth to be removed from each section, estimate the cost of construction, apportion the work to each parcel of land, specify the man-

ner in which it shall be done, and file their report with the auditor, and he shall give notice for four weeks "of the pendency and prayer of said petition, and the time set for the hearing thereof, which notice shall contain a pertinent description of the terminus of such proposed work, its direction and course from its source to its outlet, and the names of the owners of the lands that will be affected thereby, and at the same time shall mail a copy of the same to non-residents interested, whose postoffice address is known to the auditor, or can be ascertained by inquiring at the treasurer's office."

The fourth section provides that the "board of commissioners, at the time set for the hearing of said petition, shall, if they find the provisions of the second section of this act to have been complied with, proceed to hear said petition, and if they find such proposed work to be necessary and conducive to public health," etc., "they shall establish the same as specified by the report of the viewers."

Subsequent sections provide that the costs of the construction of such ditch shall be apportioned between the persons owning lands liable to be affected by the proposed work, the time within which such costs shall be paid; the time and manner in which said labor is to be performed shall be specified, and if any person shall fail to procure the construction of that portion allotted to him, the cost of the same shall be assessed against his land and collected as other taxes.

The provisions of this statute plainly require all persons upon whose lands a ditch is to be constructed to be made parties to the proceeding. This is done by giving the notice specified in the second section, and when this is done all persons become parties, though they do not appear and controvert the matter. Without this notice persons may become parties by appearing to the proceedings, and no reason occurs to us why a valid order may not be made without the notice when all persons interested are before the court by appearance, and it seems equally clear that such order can not be

made without notice unless all persons who are necessary parties are before the court. Ordinarily, when a person appears to any judicial proceeding, such appearance waives any question as to notice, but this rule only applies where the notice operates as service of process upon him. In such case the purpose of the notice is to bring him in, and where he comes without it the want of it does not affect the proceeding. This, however, is not the case where the notice is necessary in order to authorize the court to make any order at all in the proceeding. In such case a party may appear, and such appearance waives the notice so far as it operates as process upon him, but by such appearance he can not waive such notice so far as it operates as process upon others, nor so far as it is essential to give the court jurisdiction of the subject-matter of the action. An application to establish a ditch is in the nature of a proceeding *in rem*, and in order to authorize the court to make an order, the persons upon whose land the ditch is to be constructed must be before the court, either by notice or by appearance, and unless they are, the court can make no valid order concerning them. This is elementary, and is too plain to justify further discussion or the citation of authorities. The court, in such case, having no authority to make an order against such persons, it can make none against those who are before the court. The reason is obvious. The ditch is an entire thing, and in order to establish it the court must have all who are necessary parties before it. This is especially true under this statute. The work is apportioned, and A. may be required to perform his portion on B.'s land, but the court can not make a binding order against him unless it authorizes him to do the work by making a binding order against B. This it can not do if B. is not before the court, and hence it can not, in such case, make a binding order against A., though he is before the court. If in this case the greater portion of the ditch was located upon the right of way of the Columbus, Chicago and Indiana Central

Railway Company, and neither railway company was made a party by notice or otherwise, the court possessed no power to order the construction of such ditch upon its premises, and, therefore, could not make an order against the appellants to dig said ditch, or any portion of it.

It is manifest that if the owners of the land upon which the ditch is located are not before the court no order can be made, but some question has arisen as to the time and manner of making the objection. Ordinarily, any objection to the process or its service must be made before appearance to the action, and this rule applies in this case so far as the notice operates as process upon the person, but not so far as it is essential to give jurisdiction to the subject-matter of the action. The petition and the report of the appraisers together should show the land upon which the ditch is to be established, and the notice of the auditor should contain the names of the owners. This done, the court acquires jurisdiction to establish such ditch, but not a ditch upon the land of some person who has not been named and who is not a party to the proceeding, and hence if such fact appears upon the trial, it bars the establishment of such ditch. In *Schmied* v. *Keeney*, 72 Ind. 309, a proceeding to establish a highway, this court held, in effect, that if it appeared in evidence that the highway passed through the lands of persons not named in the petition, such matter constituted a defence. This proceeding is precisely analogous and the same rule must apply. This being the rule, the fact sought to be established was material, and, therefore, the court erred in refusing to submit the interrogatory and in refusing to instruct the jury that if the ditch was located as claimed, they should find for the defendants.

Neither the record made before the board of commissioners nor in the circuit court show that any notice at all was given, and in this condition of the record, especially in view of the agreement made, the fact claimed to exist was decisive of the case.

This is the controlling question, and as the cause must be reversed, it seems unnecessary to consider the ruling of the court in refusing to give certain instructions.

The judgment should be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to grant the appellants a new trial.

Filed May 14, 1884.

No. 11,086.

95	415
147	695
95	415
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ROCK *v.* MCCLARNON.

SLANDER.—*Actionable Words.*—*Complaint.*—Words not made actionable by statute and which do not charge a crime are not actionable *per se.*

SAME.—The words "C. R. * * got drunk and came home with some powders and tried to get his wife to take them, but she refused, and sent for Dr. T., and he * * said that they were arsenic and poison, and if she had taken any of them they would have killed her—C. R. tried to poison his wife," are not actionable where there is no colloquium showing extrinsic matter which would give words a meaning not expressed by them alone.

SAME.—*Innuendo.*—An innuendo in a complaint for slander does not enlarge the meaning of the words charged to have been spoken.

SAME.—A complaint in slander which does not give the slanderous words spoken, but only the effect of them, is bad.

From the Hancock Circuit Court.

J. A. New, J. W. Jones, C. G. Offutt and *R. A. Black,* for appellant.

W. R. Hough, E. Marsh and *W. W. Cook,* for appellee.

BICKNELL, C. C.—This was an action of slander by the appellant against the appellee. The complaint was in four paragraphs. Demurrers to each of said paragraphs, for want of facts sufficient, were sustained. The plaintiff refused to amend, and judgment was rendered for the defendant. The

plaintiff appealed. The rulings upon the demurrers are assigned as errors.

The words alleged in the several paragraphs are as follows:

In the first paragraph, "Charley Rock came to Greenfield and got drunk, and came home with some powders and tried to get his wife to take them, but she refused, and sent for Dr. Trees, and he came and examined the powders, and said that they were arsenic and poison, and if she had taken any of them they would have killed her."

In the second paragraph, "Charley Rock went to Greenfield and came home drunk, and brought a bottle of medicine, and tried to get his wife to take some of it, and she refused to take said medicine, and sent for Dr. Trees, and he examined it, and said if she had taken any of it, it would have killed her. Charley Rock went to Greenfield and came home drunk, and brought a bottle of medicine and wanted his wife to take some of it right away, and she refused to take it, and sent for Dr. Trees, and he came and analyzed it, and pronounced it poison, and said, if she had taken any of it, it would have killed her immediately."

In the third paragraph, "Charley Rock tried to poison his wife."

In the fourth paragraph, "Words of the effect following, that is to say, that he, plaintiff, had tried to poison his (plaintiff's) wife."

There is no special damage alleged in the complaint; therefore the complaint is not sufficient unless some one of the sets of words is actionable *per se*, or made actionable by averment of extrinsic facts. The first and second paragraphs of the complaint contain matters of inducement alleging the good character of the plaintiff and the defendant's knowledge thereof, and malicious disposition, but there is no colloquium averring any extrinsic facts, which, coupled with the words spoken, might render them actionable if otherwise they were not. See, upon this point, *Millison* v. *Sutton*, 1 Ind. 508; *Hart* v. *Coy*, 40 Ind. 553.

These paragraphs also contain several innuendoes, stating the meaning of the words, but the absence of a colloquium, showing by extrinsic matter that the words are actionable, is not supplied by mere innuendoes, attributing to the words an actionable meaning. *Schurick* v. *Kollman*, 50 Ind. 336. An innuendo can not change the ordinary meaning of language. *Hays* v. *Mitchell*, 7 Blackf. 117; *Ward* v. *Colyhan*, 30 Ind. 395.

These paragraphs contain, also, concluding averments, that the defendant, by the use of the words, "intended to charge, and to be understood as charging, the plaintiff with an attempt, by the use of poison, to unlawfully, wilfully and maliciously kill and murder his wife;" but these averments do not help the complaint. Where no extrinsic facts are averred, the naked statement that the defendant intended a slanderous charge, amounts to nothing unless the words themselves import such a charge. *Jones* v. *Diver*, 22 Ind. 184; *McFadin* v. *David*, 78 Ind. 445 (41 Am. R. 587); *Wilson* v. *McCrory*, 86 Ind. 170; *Pollock* v. *Hastings*, 88 Ind. 248. In *Wilson* v. *McCrory*, just cited, the complaint was held good, but there the words were: "Perry stole my corn;" and the complaint had a proper colloquium and innuendoes, and the concluding averments were not only that the defendant intended to charge the plaintiff with the crime of larceny, but that he was so understood by his hearers.

The question, therefore, as to the two paragraphs now under consideration is, were the words spoken slanderous *per se*?

The appellant claims that they were, because, as he says, they charged the crime mentioned in section 1919, R. S. 1881. That section is as follows: "Whoever administers, or procures to be administered, any poison to any other human being, or mingles poison with any food, drink, or medicine, with intent to kill or injure the person to whom the same shall be administered, if death do not ensue, upon conviction thereof, shall be imprisoned," etc.

The words, charged in said first and second paragraphs, do not charge that any poison was administered, or mingled with anything, with any criminal intent; they do not charge that the plaintiff knew it was poison. The statement is substantially that the plaintiff came home drunk, and offered something to his wife and asked her to take it right away, but she did not take it, and some doctor on examination pronounced it to be arsenic and poison, and said that if she had taken it, it would have killed her. There is no charge that the thing offered really was poison, and there is no such thing as administering poison unless it is either taken internally or applied externally. 2 Bishop Crim. Proc., section 645; Roscoe Crim. Ev., p. 267.

The words in these two paragraphs do not charge any offence defined in section 1919, *supra*, and they do not charge anything for which, if true, the plaintiff could be infamously punished. The appellant claims that the words under consideration are actionable, because, he says, they charge an assault with intent to commit a felony, under sections 1909 and 1910, R. S. 1881, and also because they charge that the plaintiff came home drunk; but these propositions can not be sustained.

There was no error in sustaining the demurrers to the first and second paragraphs of the complaint.

The third and fourth paragraphs of the complaint contain the same prefatory and concluding averments as the preceding paragraphs; but the words therein charged do not impute drunkenness; they are, in the third paragraph, these: "Charley Rock tried to poison his wife;" and in the fourth paragraph there are no words stated, the averment is that the defendant said of plaintiff in words of the effect following, that is to say, "that he (plaintiff) had tried to poison his (plaintiff's) wife." The fourth paragraph was clearly bad. *Atwood* v. *Taylor*, 1 M. & G. 279; *Wheeler* v. *Robb*, 1 Blackf. 330 (12 Am. Dec. 245); *Linville* v. *Earlywine*, 4 Blackf. 469;

Creelman v. *Marks*, 7 Blackf. 281; *Tucker* v. *Call*, 45 Ind. 31; R. S. 1881, section 372.

The words in the third paragraph are not actionable *per se*, because they do not charge any offence punishable under our statutes, and there are no averments in that paragraph of such extrinsic facts as sometimes make words actionable which are not such by themselves. *Jones* v. *Diver*, *supra*.

There was no error in sustaining the demurrers. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed May 16, 1884.

95 419
125 155
95 419
128 240

No. 10,978.

AUGHIE *v.* LANDIS.

CONTRACT.—*Complaint.*—*Husband and Wife.*—*Street Improvement.*—A complaint against husband and wife alleged a contract by which the plaintiff undertook to make certain improvements on a street adjoining a lot of the wife, for which the defendants were to pay him a certain sum which the wife agreed should be a charge upon the lot; that the plaintiff performed the work according to the contract, and the defendants, though requested, refuse to pay. The plaintiff having dismissed as to the wife, the husband demurred for want of facts.

Held, that the complaint, though informal, was good on demurrer.

SAME.—In an action upon a contract where the general averments of the complaint show that the claim is due and unpaid, the complaint is sufficient without averring such facts in terms.

STATUTE OF FRAUDS.—One who, upon his own credit, employs another to perform work for a third person, is liable for its payment.

From the Cass Circuit Court.

D. D. Dykeman, *W. T. Wilson* and *G. C. Taber*, for appellant.

D. B. McConnell, *R. Magee* and *S. T. McConnell*, for appellee.

HAMMOND, J.—The appellee filed his complaint in the court below against Catherine Aughie and the appellant, charging, in substance, that in October, 1876, he entered into a contract with the defendants to make certain street inprovements in the city of Logansport, in front of, and along, certain lots owned by said Catherine, for which the defendants were to pay the plaintiff a stipulated compensation; that the defendant Catherine agreed with the plaintiff that such work should be a charge upon her said lots; that the plaintiff performed the work according to the contract, "but that the defendants have refused, and still refuse, to pay the same, although often requested so to do."

The appellee dismissed as to Catherine. A demurrer to the complaint, for want of facts, was filed by the appellant and overruled by the court, to which ruling the appellant excepted. Issues were joined and tried by a jury, and a verdict returned for the appellee. Judgment was rendered on the verdict over the appellant's motion for a new trial. A number of errors are assigned, but the only one discussed in the appellant's brief relates to the sufficiency of the complaint.

We think the complaint was good. While the averments are not made directly, the facts stated show that the appellee's claim was due and unpaid. As the contract did not specify when the appellee was to do the work, the law required its performance in a reasonable time. The complaint avers that the work was done according to the contract. This is equivalent to alleging that it was done in a reasonable time after the making of the contract. As the contract made no provision when the work was to be paid for, the law required its payment as soon as completed. The averment in the complaint that the work had been finished shows that the contract price for the work was due. That it is unpaid is shown in the allegation that "the defendants have refused and still refuse to pay the same, although often requested so to do."

In an action upon a contract, if the general averments

of the complaint show that the plaintiff's claim is due and unpaid, it is sufficient without making such averment directly.

The allegation in the complaint that the work was to be a charge on Catherine's lots may be regarded as surplusage.

The appellant's contract was not within the statute of frauds. By employing the appellee to do the work, he did not thereby agree to pay Catherine's debt, but was contracting a debt of his own. If, as we may infer from the complaint, the improvements were required to be made by the city council, and were chargeable to Catherine's property, still the appellant would be liable, if the appellee did the work under a contract with him alone, or jointly with him and Catherine. One who employs another upon his own credit to perform work for a third person is liable for its payment.

The appellee's complaint stated a good cause of action. The demurrer to it was rightly overruled.

Judgment affirmed, at appellant's costs.

Filed May 15, 1884.

No. 11,242.

Armington *v.* The State, ex rel. Edwards et al., Executors.

Information.—*Ousting Officer of Private Corporation.*—*Fraud.*—Where an information, seeking the ouster of an officer of a private corporation, alleges facts showing the election of such officer at an illegal meeting of the directors of the corporation, and showing fraud practiced by the officer in deceiving the relators, directors, as to the time of such meeting, it is not necessary to allege that, had the relators been present, they would have voted against such officer.

From the Decatur Circuit Court.

W. A. Moore, J. D. Miller, F. E. Gavin, C. Ewing and *J. K. Ewing*, for appellant.

M. D. Tackett, B. F. Bennett and *D. Wilson*, for appellees.

ELLIOTT, J.—It is alleged in the information filed by the relators that the Greensburgh Lime Stone Company is a corporation, organized under the laws of this State; that the capital stock is $69,000, divided into shares of $50 each, and that the relators own 777 shares; that the by-laws provide for the holding of elections on the third Wednesday in January of each year; that the last annual meeting of the stockholders was held on the 17th day of January, 1883, at which the relators, Patton, Edwards and Wilson, were elected directors, and the appellant and one Bright B. Harris were also chosen directors. It is also alleged that the by-laws of the corporation provide that the officers shall be a president, secretary and treasurer, to be elected by the board of directors; that a special meeting of the board was called, without notice to Wilson, for the 17th day of February, 1883, and the directors who had been notified agreed to hold the meeting on the afternoon of that day; that the appellant, for the fraudulent purpose of cheating the directors out of their right to vote for officers, agreed with director Harris to hold the meeting in the forenoon, and that the director Bright B. Harris, the appellant, and one Michael Hannon, who, without right, claimed to be a director, assumed to hold a meeting of the board and to elect the appellant secretary and treasurer, and that under color of this pretended election he claims the offices, and has been performing the duties thereof. The prayer of the information is that the appellant be enjoined from exercising the functions of the offices of secretary and treasurer of the corporation, and that he be ousted from them.

A single objection is urged against the information, and that is, that it does not state that if the absent directors had been present they would have cast their votes against the appellant. In our opinion the appellant's argument rests on an undue assumption, and is, consequently, utterly unsound. It assumes, what is not true, that there was a valid election. There was, in truth, no meeting of the directors and no election, for

but two of the five directors were present, and there was, therefore, no quorum capable of transacting business. The information not only shows that there was no quorum, but it also shows that the appellant, by a fraudulent scheme, succeeded in going through the form of an election after he had deceived the directors as to the time of the meeting, and had thus designedly prevented their presence. It would be a reproach to the law if it permitted a man to hold a corporate office thus corruptly and illegally obtained.

Judgment affirmed.

Filed May 17, 1884.

No. 10,624.

CALLOWAY ET AL. *v.* BYRAM ET AL.

JUSTICE OF THE PEACE.—*Jurisdiction.*—*Judgment.*—A promissory note for $300, dated three days before its execution, and bearing interest at 8 per cent. per annum, was filed as the cause of action before a justice of the peace. The note was, in fact, executed on the date it was filed, and on the same day there was judgment by confession for $300.

Held, that the amount demanded by the cause of action—the note—must, under the circumstances, be regarded as only $300, without adding interest for three days according to the face of the note, and therefore the justice had jurisdiction and the judgment was valid.

CONFESSION OF JUDGMENT.—A judgment on a claim not due, rendered by confession, is not void.

From the Madison Circuit Court.

C. L. Henry, *H. C. Ryan*, *N. Morris* and *L. Newberger*, for appellants.

G. W. Stubbs and *T. S. Rollins*, for appellees.

ZOLLARS, J.—On the 13th day of September, 1881, Norman S. Byram and Edward G. Cornelius recovered a judgment by confession, before a justice of the peace, against Anderson Moore, for $300. In the justice's record, Moore is

named as defendant, and the other parties as plaintiffs. Following the title of the cause, it is stated that the plaintiffs filed, as their cause of action, a promissory note, which is set out in full. This note bears date September 10th, 1881, was for $300, payable one day after date to Byram, Cornelius & Co., with 8 per cent. interest per annum, and was signed by Moore. It is further stated in that record that, "On the filing of the foregoing note, came the defendant, Anderson Moore, and confessed judgment, and on his oath says that the above note is just, due and unpaid," etc. Following this is the judgment for $300.

The note, although bearing date of the 10th day of September, 1881, was neither written, signed, nor delivered until just before the confession of the judgment. Moore was indebted to Byram and Cornelius on an account. The note was executed for the purpose of taking judgment upon it at that time. Execution was issued on the judgment at once, and placed in the hands of the constable, one of appellees, on the following day. On that day, he levied upon ninety dollars worth of Moore's personal property, and took it into his possession. Moore had other personal property. After the execution came into the hands of the constable, and after the levy above mentioned, Moore sold his personal property, and that levied on, to one Dissar, and he sold it to appellants. After this, and on the 21st day of September, 1881, the constable levied the execution upon the personal property so sold to appellants, and took it into his possession. On the 26th day of the same month, appellants commenced this action, and took all of the property from the constable and the judgment plaintiffs, Byram and Cornelius, by a writ of replevin, claiming the possession and ownership of it, by virtue of their purchase, as aforesaid. Appellees claim under the judgment, execution and levy. These are the facts, as shown by the pleadings and the special findings of the court below, upon the trial of this cause. Judgment was ren-

dered below for the return of the property, etc., to appellees. From this judgment, appellants prosecute this appeal.

It is said by counsel for appellants that, if the execution was a valid lien upon the property, the judgment in this case must be affirmed. They claim that it was not a valid lien, because not issued on a valid judgment. And they claim that the judgment rendered by the justice of the peace was and is void, because the note and interest exceeded the jurisdiction of a justice of the peace as fixed by law.

The amount for which a judgment may be confessed in a justice court is fixed at $300. 2 R. S. 1876, p. 605, section 10; section 1433, R. S. 1881. The judgment before the justice in the case under consideration was for $300, and no more. It is well settled that a justice of the peace can not render a valid judgment for an amount beyond his jurisdiction. The rule is also well settled, in controverted cases, at least, that the amount demanded is the criterion upon the question of jurisdiction. *State, ex rel.*, v. *Forry*, 64 Ind. 260; *Second Nat'l Bank* v. *Hutton*, 81 Ind. 101. If that rule should be applied here, upon the theory that the note was executed as of the date upon it; that the interest was not paid, and that the filing of the note was a demand for the amount of it and interest, we should have a case beyond the jurisdiction by a small amount. The note, it is true, was filed as the cause of action, and Moore stated in his affidavit that the note was unpaid; but in view of the fact that the parties were all present when the judgment was rendered for $300, it would not be a fair presumption nor a reasonable construction to say that Moore's affidavit included as unpaid both the amount of the note and the interest. The more reasonable construction is, as manifestly understood by all parties, that the amount named in the note, viz., $300, was due. Presumptions are to be indulged in favor of judicial proceedings, unless infirmities are apparent upon the face of the record. We can not say from the record in the justice court that the interest was not paid, or

that it was not remitted by some arrangement between the parties; nor can we say, upon that record, that more than $300 was demanded.

As was said in the case of *Barnett* v. *Juday*, 38 Ind. 86, where a similar affidavit was made, the note may have been subject to credits, reducing the amount due upon it to the sum for which the judgment was rendered; or, possibly, there may have been some other reason for rendering the judgment for only $300.

In the case of *Remington* v. *Henry*, 6 Blackf. 63, a judgment was confessed upon a note for $100, which, upon its face, under the law as it then was, exceeded the jurisdiction of the justice. The note was filed as the cause of action, as in this case. The court said: "But as the amount actually demanded and recovered was under that sum, and within the jurisdiction of the justice, the presumption is that the note had been reduced by credits."

We think, moreover, that it was competent to plead and prove that the note, although it bore date September 10th, was not executed until the 13th, and that it was executed upon that day for the purpose of taking a confession of judgment upon it.

A note is not executed until it has been in some way delivered. It is always competent to prove the time of such delivery. We know of no reason why a valid judgment may not be confessed upon a note before its maturity; that is a matter that may be waived by the debtor.

The fact that a note may not be due at the time of a confession upon it, might be a suspicious circumstance in a contest with other creditors of the debtor, but it would not render the judgment void in the proper sense of that term. *Robertson* v. *Huffman*, 92 Ind. 247.

The objection urged against the execution in this case, that it does not contain the correct names of the parties to the judgment, is not well founded in fact.

It results, from what we have said, that the court below did not err in overruling appellants' demurrer to appellees' third paragraph of answer, nor in its conclusions of law upon the facts specially found.

Having reached this conclusion, it is not necessary to notice other questions discussed by counsel. The judgment is, therefore, affirmed, with costs.

Filed May 16, 1884.

No. 11,423.

95 427
f169 301

YEAGER *v.* THE BOARD OF COMMISSIONERS OF GIBSON COUNTY.

COUNTY SUPERINTENDENT.—*Statistics.*—*Fees and Salaries.*—The duty imposed on the county superintendent of schools to make reports to the bureau of statistics, by section 5720, R. S. 1881, is an official duty imposed upon the officer, for which he is not entitled to compensation.

From the Gibson Circuit Court.

H. A. Yeager, for appellant.

L. C. Embree and *M. W. Fields*, for appellee.

FRANKLIN, C.—In January, 1883, appellant, as county superintendent of common schools, filed a claim before the board of commissioners for nine days' service in making statistical reports to the chief of the bureau of statistics, in September, 1882, at $4 per day—$36. The claim was disallowed by the commissioners, and the plaintiff appealed to the circuit court, where a demurrer was sustained to the claim. The plaintiff has appealed to this court, and assigned as error the sustaining of the demurrer.

The objections to the statement of the claim are that it does not aver that the services were rendered for the use of or at the request of the county, or at the request of the chief of

the bureau of statistics; and it is insisted that the county is not liable to pay for such services.

The claim, as stated, would certainly not be a sufficient complaint in a suit commenced in the circuit court. But as a claim before the board of commissioners, it informs the defendant of the nature of the claim, and states facts sufficient to bar another action for the same thing, and is sufficient in form. *Board, etc.*, v. *Ritter*, 90 Ind. 362; *Board, etc.*, v. *Armstrong*, 91 Ind. 528; *Newsom* v. *Board, etc.*, 92 Ind. 229. The main question is as to whether the county can be held liable to pay for such services.

A county superintendent of public schools is a county officer, whose general duties are to superintend the schools of the county. R. S. 1881, section 4429.

The 4433d section provides for his compensation, the first part of which reads as follows: "The county superintendent shall receive four dollars for every day actually employed in the discharge of the duties required by this act. But before the county commissioners shall allow his per diem, the same shall be presented in a bill of account, stating, in separate items, the nature and amount of service rendered on each day for which he claims compensation; which bill of account shall be verified by affidavit to the effect that the same and each item thereof is just and true."

The services for which the county is liable to pay the superintendent of common schools four dollars per day must be such as are contemplated and provided for by this act.

The act of March 29th, 1879, providing for the bureau of statistics, provides for the appointment of a chief, "who shall have power to employ such assistants as he may deem necessary, and said officer and assistants shall constitute the Indiana Bureau of Statistics and Geology, with headquarters to be furnished by the State."

The 5719th section, R. S. 1881, reads: "The duties of said bureau shall be to collect, systematize, tabulate, and present

in annual reports, as hereinafter provided, statistical information and details relating to agriculture, manufacturing, mining, commerce, education, labor, social and sanitary condition, vital statistics, marriages, and deaths, and to the permanent prosperity of the productive industry of the people of the State."

The 5721st section provides that the compensation of the chief of said bureau shall be $1,200, to be paid out of the state treasury, which is all the compensatory provision made for any services rendered by, or connected with, the bureau.

The bureau appears to be a State, and not a county institution.

The 5720th section provides for its duties, and reads as follows: "It shall be the duty of the several city, incorporated town, county, and township assessors, trustees, officers of school boards, and boards of health, in their respective cities, towns, counties, and townships; the agents or superintendents of all manufacturing, mining, and mechanical establishments; the managers and superintendents of all corporations, manufacturing, mechanical, and transportation companies and associations; and county superintendents of schools,—to make reports and answer questions relating to the duties of said bureau, upon such blanks as may be furnished to them for such purposes by said bureau."

The duty here imposed upon the county superintendent of common schools forms no part of his official duties under the school law, and the county is no more liable to pay him for services in the discharge of these new duties imposed in relation to a state institution, than it is to pay any one or all of the other persons required to perform similar services. To pay for such services was certainly never contemplated by the Legislature in the passage of the statistical bureau statute, or it would have made some provision for such compensation.

The office of county superintendent of schools is a creature of the Legislature, and the power that created can change or

abolish it at pleasure, and place such restrictions and limitations around it, and require such duties to be performed by the person holding it, and declare what compensation shall be received for the discharge of all or any part of its duties, as the Legislature may deem right and proper. The person who accepts and assumes to act in the office takes it *cum onere*, not only of existing duties, but subject to such as may thereafter be legally imposed, and subject to such rights and liabilities as to compensation as the Legislature has or may declare. If the Legislature imposes burdensome or unremunerative duties, he must perform as required or resign the office. Such duties are official, and not particular services, under the Constitution, which can not be required without just compensation. *Turpen* v. *Board, etc.*, 7 Ind. 172; *Coffin* v. *State*, 7 Ind. 157; *Board, etc.*, v. *Blake*, 21 Ind. 32; *Board, etc.*, v. *Templer*, 34 Ind. 322; *Blakemore* v. *Dolan*, 50 Ind. 194; *Falkenburgh* v. *Jones*, 5 Ind. 296; *Rawley* v. *Board, etc.*, 2 Blackf. 355.

There was no error in sustaining the demurrer to plaintiff's claim. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed May 16, 1884.

No. 10,941.

MURPHY *v.* MURPHY.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellant.

C. V. McAdams, for appellee.

ELLIOTT, J.—The appellant did not question the complaint in the court below, but does here challenge its sufficiency in his assignment of errors.

It is well settled that a complaint will be sustained against an attack made after verdict if it contains statements from which a cause of action may be inferred by fair intendment. The complaint before us contains statements from which all facts essential to the relief prayed may be reasonably inferred, and is, therefore, sufficient to repel the attack here made.

It is not necessary to use the language of the statute in setting forth causes for a divorce; it is sufficient to plead the facts without adding mere conclusions of law.

There is evidence supporting the finding of the court, and we will not disturb it. Judgment affirmed.

Filed May 16, 1884.

No. 11,109.

MATHEWS ET AL. *v.* MACK ET AL.

95 431
Case 1
158 290

From the Elkhart Circuit Court.

J. M. VanFleet, for appellants.

H. C. Dodge and *O. Z. Hubble*, for appellees.

FRANKLIN, C.—The main question in this case is settled by the decision in the case of *Wright* v. *Mack*, *ante*, p. 332. Upon the authority of that case the judgment in this case ought to be reversed.

PER CURIAM.—The judgment of the court below is in all things reversed, at appellees' costs.

Filed March 12, 1884.

No. 8763.

SHORT ET AL. *v.* KERNS ET AL.

From the Kosciusko Circuit Court.

C. W. Chapman and *A. W. Short*, for appellants.

95 431
Case 2
159 401

HAMMOND, J.—This was an action by the appellees upon three notes and a mortgage to secure their payment. The notes and mortgage were executed by the appellant Short to Martin Hillabold. The complaint alleged that Hillabold "assigned all of said notes by endorsement thereon in writing to these plaintiffs." The appellants, other than Short, were made parties defendants as lien-holders to foreclose their equity of redemption. Short demurred to the complaint, but his demurrer was overruled, to which

he excepted. Issues were joined; trial by the court; finding for the appellees, and judgment on the finding over the appellant Short's motion for a new trial and exceptions.

Copies of the notes and mortgage declared upon were filed with the complaint, but copies of Hillabold's endorsements of the notes were not filed. The omission of copies of such endorsements is the only objection urged against the complaint. In an action on a promissory note by the assignee against the maker, it is sufficient to allege in the complaint that the note was assigned by endorsement. It is not necessary in such suit to file with the complaint a copy of the endorsement. *Treadway* v. *Cobb*, 18 Ind. 36; *Tilman* v. *Harter*, 38 Ind. 1; *Keller* v. *Williams*, 49 Ind. 504; *Kline* v. *Spahr*, 56 Ind. 296.

The evidence is not in the record, and no complaint is made of the ruling on the motion for a new trial. Affirmed, with costs.

Filed May 17, 1884.

No. 10,376.

Albertson *v.* The State, ex rel. Wells.

From the Hamilton Circuit Court.

D. Moss, *R. R. Stephenson* and *H. A. Lee*, for appellant.

J. A. Roberts and *T. E. Boyd*, for appellee.

Franklin, C.—This case is between the same parties as *Albertson* v. *State*, *ex rel.*, *ante*, p. 370, and is for assessments falling due subsequent to those sued for in that case. The same questions are insisted upon that were presented in that case. The only difference is that in this case a demurrer was filed to the complaint. But that does not change the questions presented, because in that case, the demurrer being sustained to the answer, as it was in this, reached back to the complaint, and resulted the same as if it had been filed to the complaint. Upon the authority of that case the judgment in this case ought to be affirmed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed May 14, 1884.

END OF NOVEMBER TERM, 1883.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1884, IN THE SIXTY-EIGHTH YEAR OF THE STATE.

No. 11,483.

VINTON *v.* BALDWIN.

SPECIAL VERDICT.—*Judgment.*—A plaintiff is not entitled to judgment on a special verdict which does not find all the facts which it was necessary he should prove.

SAME.—*New Trial.*—*Practice.*—Where a special verdict fails to find the facts which were established by the evidence, a motion for a new trial is the proper remedy.

CONTRACT.—*Broker.*—*Lien.*—*Loan Agent.*—One employed to obtain a loan upon a commission has a lien on the fund for his fees, and may retain them.

SAME.—*Construction.*—Where the terms of a contract are of doubtful inport, the construction which the parties placed upon it by their acts will prevail.

SAME.—*Performance.*—*Excuse for Non-Performance.*—Where one party to a contract notifies the other that he will not perform it, performance by the other is unnecessary.

From the Montgomery Circuit Court.

B. T. Ristine, T. H. Ristine, H. H. Ristine, P. S. Kennedy and *S. C. Kennedy*, for appellant.

M. Thompson, W. B. Herod, W. H. Thompson and *A. D. Thomas*, for appellee.

ELLIOTT, C. J.—The appellant is not entitled to a judgment upon the special verdict, for the reason that it does not state all the facts essential to a recovery. It is well settled that a party who has the burden of proof can not recover upon a special verdict or special finding, unless all facts essential to a recovery are found in his favor. Our cases are all to the effect that if the finding or verdict is silent upon a material point, it is deemed to be against the party who has the burden of proof. *Stropes* v. *Board, etc.*, 72 Ind. 42; *Ex Parte Walls*, 73 Ind. 95, and authorities cited; *Williams* v. *Osbon*, 75 Ind. 280; *Parker* v. *Hubble*, 75 Ind. 580; *Jones* v. *Baird*, 76 Ind. 164; *Henderson* v. *Dickey*, 76 Ind. 264; *McLaughlin* v. *Ward*, 77 Ind. 383; *Studabaker* v. *Langard*, 79 Ind. 320; *Spraker* v. *Armstrong*, 79 Ind. 577; *Gauntt* v. *State, ex rel.*, 81 Ind. 137; *City of Lafayette* v. *Allen*, 81 Ind. 166; *City of Elkhart* v. *Wickwire*, 87 Ind. 77; *Dodge* v. *Pope*, 93 Ind. 480.

In *Dixon* v. *Duke*, 85 Ind. 434, it was said: "It is a familiar rule that a special verdict must find such facts as entitle the party having the burden of proof to a judgment. If the facts found are not sufficient to entitle the plaintiff to a judgment, then the defendant's motion for a judgment should be sustained, unless the case is one where the burden is upon the defendant."

Where the special verdict does not find facts established by the evidence, the remedy is by a motion for a new trial upon the ground that the verdict is contrary to the evidence. The cases we have cited firmly establish this rule.

The appellant asked, in due form, for a new trial, but the court denied his motion, and of this ruling he complains.

There is no conflict in the evidence as to the contract made by the parties, for it is conclusively shown that the agreement was that the appellant was appointed the appellee's agent to procure a loan, and that the latter promised to pay the former for his services "five per centum commission on the amount of the loan obtained." This was the contract between the

parties, and it received construction in *Vinton* v. *Baldwin*, 88 Ind. 104 (45 Am. R. 447), where it was held that "A broker who is employed to procure a loan is entitled to his commission when he procures a lender ready, willing and able to lend the money upon the terms proposed." That the rule of law was correctly stated in the case cited can not be questioned, for all the authorities are to that effect.

The appellee's position in the present appeal is that there was no performance of the contract, because Vinton offered him only $4,960, when the loan for which he contracted was $5,500. It is shown by the contract that Vinton was to receive a stipulated commission, namely, five per cent. on the amount of the loan, and it is insisted that because he retained this commission the appellee was justified in repudiating the contract. It seems clear that Vinton had a right to retain this commission without going through the idle ceremony of handing the money over to the appellee and then receiving it back from him. The authorities so determine the question, for it is uniformly held that a broker has a lien for his commission, and that an agent or broker having property or money in his hands may retain the amount of his lien out of it. Biddle Stock Brokers, 118; Whart. Agency, section 706; Overton Liens, pp. 44, 114; Story Agency, section 352; *Hanna* v. *Phelps*, 7 Ind. 21; *Shaw* v. *Ferguson*, 78 Ind. 547. This rule applies to bankers, attorneys, and others who receive money upon which they are entitled to fees or commissions. Overton Liens, p. 82, section 63, p. 100, section 79. It was proper, therefore, for the appellant to retain his commission.

The remainder of the sum retained by Vinton was withheld upon the ground that the contract gave the lender the right to retain one per centum of the entire interest. The appellee insists that there was no right to retain this sum, and the proper decision of this point depends upon the meaning to be assigned to a clause in the written application which was signed contemporaneously with the execution of the contract. The question and answer contained in the application reads

thus: "21. What amount of loan is wanted, for what time, and rate? Answer. $5,500; for five years, 8 per cent., payable semi-annually, 1 per cent. of interest in advance." We think that this imports an agreement that the entire loan shall bear interest at the rate of eight per centum per annum, and that one per centum of the entire interest shall be paid in advance. The language used is "1 per cent. of interest in advance," and, giving to words their natural force and meaning, it must be held that the clause means one per centum of all the interest. It is difficult to see how any other meaning can be assigned to the language employed, for there are no words restricting the operation of the language to part of the interest. Courts must enforce contracts as the parties make them, and have no power to interpolate or take out words except in cases where it is entirely clear that the words are improperly in the contract, or have been omitted by mistake. In no case, however, can words be supplied or withdrawn unless it is necessary to complete the sense, and here the sense is fully expressed.

But, if we should be wrong in this, there is another rule which makes it clear that the contract must be construed as we construe it. The rule to which we refer is thus stated by the Supreme Court of the United States: "In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence." *Chicago* v. *Sheldon*, 9 Wall. 50. Bishop says: "In a doubtful case, the interpretation which the parties themselves have, by their conduct, practically given their contract, will prevail." Bishop Cont., section 598. This doctrine has often been asserted and enforced by this court. *Crabb* v. *Atwood*, 10 Ind. 322; *Morris* v. *Thomas*, 57 Ind. 316; *Aimen* v. *Hardin*, 60 Ind. 119; *Johnson* v. *Gibson*, 78 Ind. 282; *Reissner* v. *Oxley*, 80 Ind. 580; *Willcuts* v. *Northwestern, etc., Co.*, 81 Ind. 300. Before any controversy had arisen, and while the parties were acting

under the contract, and were attempting to carry it into execution, bonds, coupons and a mortgage were executed by the appellee, which clearly and unmistakably fix the construction of the contract. These instruments show, beyond all cavil, that the parties understood the contract to mean one per centum of the entire interest.

Another point is made by the appellant which seems to be decisively against the appellee, and that is, that without objection he executed the instruments to secure the loan, and then, having done this, repudiated the whole contract. It is a well settled rule that where one party to a contract notifies the other that he will not perform his part of the agreement, performance by the party to whom such notice is given is unnecessary. *Hanna* v. *Phelps*, 7 Ind. 21; *Turner* v. *Parry*, 27 Ind. 163; *Bartlett* v. *Adams*, 43 Ind. 447; *Blair* v. *Hamilton*, 48 Ind. 32; *Floyd* v. *Maddux*, 68 Ind. 124; *Phœnix Ins. Co.* v. *Hinesley*, 75 Ind. 1; *Willcuts* v. *Northwestern, etc., Co., supra; Ætna Ins. Co.* v. *Shryer*, 85 Ind. 362, *vide* auth., p. 368.

An elementary writer thus states the rule: "It is a principle of law, that he who prevents a thing from being done, shall not avail himself of the non-performance which he has himself occasioned. Where, therefore, it was covenanted between the plaintiff and the defendant that the plaintiff should execute and deliver an assignment and general release to the defendant, and the plaintiff offered to assign, and execute and deliver the release, and tendered a draft for the defendant's perusal, but the defendant refused to look at it, and said he would have nothing to do with it, it was held that the defendant had discharged the plaintiff from doing anything farther." 1 Addison Cont., sec. 326.

Growing out of this general principle is the subsidiary one, that when a party makes a general refusal to perform, he can not afterwards shift his ground and put a defence upon a different one. *Hanna* v. *Phelps*, *supra*. The evidence shows, without material conflict, that the appellee refused, and in general terms, to perform his part of the contract, after hav-

ing accepted as performance, in part, at least, the evidences of indebtedness tendered him to sign as satisfactory, and, after having done this, he is not in a situation to evade payment for the services of the agent. Of course, if any fraud or wrong on the part of the agent had been shown, a different rule would apply, but there is no such issue presented, nor was there any such evidence.

Under the rules of law the verdict can not stand, as it is wholly unsupported by the evidence.

Judgment reversed, with instructions to grant a new trial.

Filed May 26, 1884.

No. 11,210.

BINFORD, GUARDIAN, *v.* MINER.

COSTS.—*Dismissal.*—*Practice.*—A plaintiff in ejectment, in consequence of the admission of evidence which it had been agreed in writing by the defendant's attorney should not be offered, moved to dismiss his cause without prejudice, and to tax all costs accruing after the agreement to the defendant and his attorney. Without objection the court granted the motion to dismiss, and took the question of costs under advisement. Afterwards the motion as to costs was overruled.

Held, that there was no error, and that the question is not presented to the Supreme Court by the appeal from the ruling.

From the Hancock Circuit Court.

J. H. Binford, J. A. New and *J. W. Jones*, for appellant.

W. R. Hough, C. G. Offutt, J. H. Mellett and *J. L. Mason*, for appellee.

ZOLLARS, J.—In October, 1881, Robert Binford filed his complaint against appellee for the recovery of real estate. Appellee answered by general denial. Before going to trial the following written agreement was entered into, viz.:

"ROBERT BINFORD *v.* THOMAS H. MINER. No. ——.

"The defendant denies that he ever was the tenant of the plaintiff upon the premises mentioned in the complaint, and he agrees that he will offer no evidence in this cause to prove

that he is now a tenant of the plaintiff, or that he was at any time before March 4th, 1881, a tenant of the plaintiff, or that he ever held over as a tenant of the plaintiff, or that he is now holding as a tenant of the plaintiff. This 19th day of January, 1882."

This agreement was signed by counsel as the attorneys of the respective parties.

On the day following the trial was commenced, and on the 23d day of the same month, the jury, having failed to agree, were discharged.

In April, 1882, a trial of the case resulted in a verdict for the plaintiff. In June following a new trial was granted to appellee as a matter of right under the statute.

In January, 1883, appellant herein, as the guardian of Robert Binford, who had become insane, was substituted as a party plaintiff. He filed an amended complaint, the substance of which is that Robert Binford was the owner of and entitled to the possession of the real estate described, and that appellee unlawfully held the possession of it, claiming to be the owner in fee simple. Prayer for possession and damages for the retention. Answer of general denial.

Upon the issues thus presented the parties entered upon the third trial before a jury. Appellant, having introduced a deed for the land from appellee to Robert Binford, dated the 4th day of March, 1879, and evidence tending to show that, after the execution of the deed, appellee leased the land of Robert Binford for a period of two years, from the date of the deed, and remained in possession of the land under and by virtue of the verbal lease, rested his case.

Appellee then produced a witness, and proposed to prove by him that after the expiration of the two years, and before the commencement of this action, appellee remained in possession of the land and paid rent to Robert Binford. This was objected to by appellant, on the ground that the introduction of such proof would be a violation of the written

agreement above set out. The court overruled the objection, and admitted the testimony, on the ground that the written agreement, not having been signed by appellee, although signed by his attorneys, was so signed without his knowledge or consent, and was not binding upon him. The court also refused to admit in evidence the written agreement.

Thereupon appellant moved for the dismissal of his cause without prejudice, and the taxation of all costs which accrued subsequent to the agreement, against appellee and two of his counsel. The court sustained the motion to dismiss, and took under advisement the portion in relation to the taxation of costs.

Appellant is not in a condition to complain that the court treated the motion as divisible, and sustained it as to the dismissal without reference to the taxation of the costs, for the reason that he interposed neither an objection nor exception to the court's action.

It is shown in different ways by the record, that appellee has claimed, and still claims, that the deed from him to Robert Binford, although absolute in form, is simply a mortgage for the security of a sum of money due from appellee.

The showing in support of appellant's motion to tax the costs, as made by him and counsel, is, substantially, as follows: On the day the contract was signed, counsel for appellant learned that subsequent to the 4th day of March, 1881, when it is claimed by appellant that appellee's lease terminated, Robert Binford accepted rent from appellee for the year 1881. Believing that appellee could and would produce evidence of that fact, and that such evidence would defeat plaintiff's action, appellant's counsel informed the counsel for appellee of the fact, and also informed them that unless appellee would agree to produce no proof of such subsequent payment of rent, the plaintiff would dismiss his case, and recommence it after the expiration of the year for which rent had been so accepted. Appellee and his attorneys were anxious that the case should be proceeded with, as they had a witness

in attendance from Missouri. To prevent a dismissal, and have a trial at once, the written agreement was drawn up and signed by counsel. After the agreement was thus executed, appellant's counsel filed it with the clerk, as a paper in the case, and from that time forth relied upon it. In the first two trials its terms were complied with, and no proof of such subsequent payment of rent was made. Neither appellant nor his counsel had any notice that appellee and his counsel would disregard the agreement until after appellant had rested his case upon the last trial. At the time, appellant's counsel informed one of the counsel for appellee of their purpose to dismiss unless some such agreement could be made, that counsel replied that he could give no answer until after consultation with his client and associate counsel. One of appellee's counsel wrote the contract, and when it was signed and filed appellee and his counsel were in the court-room.

The showing of appellee in resistance of the motion is, substantially, as follows: The contract was executed by his attorneys without his knowledge or consent; he never knew of the existence of the agreement until the day preceding the commencement of the last trial, when informed of it by his counsel, and never saw it until produced upon the trial; his understanding and belief had all the time been, prior to the last trial, and he so informed his counsel, that appellant relied wholly upon the deed. His defence, as he understood it, and as understood by his counsel, was that the deed was simply a mortgage. To prove this fact the witness from Missouri was present at the first trial. Upon the two former trials appellant did so rely upon the deed, and appellee upon his said defence. He states that he has at all times denied any tenancy, and claimed that whatever was given to Robert Binford from the farm was not in the way of rent, but as so much upon the indebtedness, which the deed was given to secure.

He states further that he had no knowledge that the agreement was filed; denies that it has been on file with the papers, and states his belief that it has all the time been in the

possession of appellant's attorneys. He states as his belief, also, that his attorneys executed the contract without knowledge that appellant would in any way rely upon a tenancy between him and Robert Binford, and meant only, that as against the deed to appellant, no evidence of a tenancy or holding over should be produced. He also states his belief that when the contract was executed appellant and his counsel so understood it.

The substance of the statements of appellee's counsel is that they executed the contract without the knowledge of, and without authority from, appellee; that they executed it for the purpose of preventing a dismissal, and getting a speedy trial, and did not know, or think that the question of tenancy could become important; that they and their client denied all such tenancy; that they did not know that the question of a tenancy would be important until the jury was charged upon the trial next before the last, and that when the contract was executed they had no intimation of any such thing as a tenant holding over.

Upon these showings, which were under oath, the court overruled appellant's motion to tax the costs against appellee, and upon his motion rendered judgment against appellant for the whole of the costs. Although appellant's motion included two of appellee's attorneys, they were not summoned into court, and the case was proceeded with as though the motion did not include them. We so treat it here.

The showings are not without conflict and contradictions. These facts, however, are established by them and the record, viz.: But for the agreement appellant would have dismissed his case before the first trial, and the subsequent costs would not have been made. Appellee's attorneys, to prevent a dismissal, and get a speedy trial, executed the agreement, without authority from appellee, except the authority incident to their employment to defend the case. The agreement was filed with the clerk by appellant's counsel without the knowledge of appellee or his attorneys at the time. Sometime before the

last trial one of appellee's counsel learned that the agreement had been filed, and made no objection. Appellee learned of the agreement the day before the last trial was commenced, and made no objection. After appellant, upon the last trial, had made proof of a tenancy between appellee and Robert Binford for a term extending from the 4th day of March, 1879, to the 4th day of March, 1881, appellee and his attorneys, for the first time, claimed the right, and were allowed to make proof that subsequent to the 4th day of March, 1881, appellee delivered to said Binford a portion of the crops raised upon the land in 1881. They claimed this right upon the ground that the contract was executed under a misapprehension of its scope and purpose, and without authority from appellee. The proof was allowed upon the ground that the attorneys had no authority to bind appellee by it.

The fact that one side was claiming title under a deed, absolute upon its face, and the other that it was but a mortgage, and the further fact that the complaint charged that appellee was in possession, claiming to be the owner in fee simple, furnished some excuse for the misapprehension of counsel as to the scope and purpose of the written contract. Whatever the title of appellant might have been, the action for possession might have been defeated by showing that appellee was in possession as his tenant. Counsel might readily, therefore, have thought that the purpose of the admission of no tenancy was to eliminate that question from the controversy, and leave the case to be decided upon the question of title, and the right of possession that would result therefrom.

This, however, would furnish no sufficient legal excuse. The contract speaks for itself. It is an unconditional undertaking that appellee should produce no proof of a tenancy subsequent to March 4th, 1881, and imposes no restrictions upon the right of appellant to make proof of a tenancy prior to that time. Such proof, therefore, by appellant, furnished no excuse for appellee to violate the contract. Contracts of this character, which may influence the parties in the conduct

of the litigation, should be entered into with a full understanding and most sacredly kept.

Whether the contract was one which an attorney may make, and thereby bind the client, without special authority; whether both parties should have knowledge of, and consent to the filing of the contract to make it obligatory upon the clients, under section 968, R. S. 1881; whether the subsequent knowledge of the filing by one of the attorneys for appellee, and his silence, amounted to a ratification, and whether appellee's knowledge of the existence of the contract, and his silence, amounted to a ratification, are questions which we need not now decide. From the view we feel constrained to take of the case, a decision upon these questions is unnecessary, and might justly be regarded as dicta.

The evidence of tenancy was very important to either party. For the plaintiff it would show almost conclusively that the deed was intended to and did convey title, and was not a mortgage simply; and if appellee had, indeed, become the tenant of appellant, he was estopped to deny his title.

On the other hand, if appellee was holding over as a tenant, appellant having accepted a portion of the crops as rent for the year 1881, he could not succeed in his action for possession. If, therefore, the court below erroneously admitted the evidence on the part of appellee, and it established a tenancy subsequent to March, 1881, it was an error of serious consequences to appellant. For such errors the law has provided a remedy; that remedy, in all ordinary cases, is to proceed to final judgment, and upon an appeal therefrom present to this court the errors in the admission of the improper testimony. That was the proper remedy in this case, unless it can in some way be made an exception to the general rule. We think it can not. While the refusal of appellee to abide by the agreement was the cause of the court's ruling, it was the court's ruling after all that injured appellant. If the court had ruled that by reason of the contract the testimony offered by appellee should be excluded, appellant would have had

no cause of complaint, notwithstanding appellee may have acted in bad faith in an attempt to violate the contract and introduce the testimony.

To decide the question of costs, therefore, we must first decide upon the ruling of the trial court in admitting the testimony. Such a question can not be brought here for review on this kind of an appeal. To hold that it could would be to hold, practically, that in every case of an adverse ruling the complaining party might dismiss his case, move to tax the costs occasioned by such ruling, appeal here, and have such ruling reviewed. Had appellant gone on with the trial to final judgment and defeat, he could have appealed to this court and presented the whole question as to the force and effect of the contract, and the ruling of the court below in admitting the testimony over its stipulations. If, upon such appeal, this court should differ with the court below, the judgment would be reversed, and this would carry the costs against the appellee.

Upon the appeal, as here taken, we could not intelligently decide as to whether or not appellee should have been taxed with the costs without first deciding that the dismissal of the appeal by appellant was an absolute necessity. In his showing, in resistance to the motion, appellee claimed, under oath, and still claims, that the portion of the crops given to Binford was not in the way of rent, and doubtless would have so testified upon the stand had he been called as a witness. This might not have been very beneficial to appellant, but we have no way of knowing how the jury might have regarded it; they might have returned a verdict for appellant. The witness who testified in relation to the crops did not know, nor state that they were given as rent. Appellant seems to concede that they were so given, but there is nothing in the record to show it. For aught that is shown in the record, they may have been given in payment of some debt entirely disconnected with the subject of this litigation, or they may have been purchased by Binford and paid for in cash; for aught that appears, appellant may have been able to show this

by witnesses; and, for aught that appears, appellant may have been able to utterly overthrow the testimony of appellee's witness by impeachment. In any of these possible events, a dismissal by appellant would have been ill advised.

The impropriety of attempting to decide that a voluntary dismissal in any case is a necessity, as preliminary to the decision of other questions, must be apparent.

The judgment of the court below was in accord with the general rule that upon a voluntary dismissal the costs will be adjudged against the dismissing party.

The record before us does not bring up and present to this court the questions sought to be presented in such a manner as to authorize a reversal of the judgment of the court below. The judgment is, therefore, affirmed, with costs.

Filed May 26, 1884.

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158	57

No. 11,493.

Riley et al. *v.* The State.

Criminal Law.—*Obstructing Railroad.*—*Indictment.*—An indictment for obstructing a railroad track, under R. S. 1881, section 1960, if it follow the language of the statute, need not state evidence from which it will appear that the obstruction was such as would endanger the passage of trains or throw engines or cars from the track.

Same.—*New Trial.*—*Separation of Jury.*—In a criminal case the separation of the jury after retirement to deliberate, unattended by an officer, without leave of court, though made a cause for new trial by statute, R. S. 1881, section 1842, yet, in view of section 1891, the Supreme Court can not reverse on that ground where it affirmatively and clearly appears that the substantial rights of the defendant suffered no injury; but if in such case there be a doubt of guilt from the evidence, or whether the the jury were tampered with, it will reverse.

From the Marshall Circuit Court.

B. L. Crawford, *H. Corbin* and *C. Kellison*, for appellants.

F. T. Hord, Attorney General, *E. C. Martindale* and *W. B. Hord*, for the State.

Riley *et al.* *v.* The State.

HAMMOND, J.—Indictment in seven counts, charging the appellants with placing an obstruction upon the track of the Pittsburgh, Fort Wayne and Chicago Railroad, so as to endanger the passage of trains, and to throw the engine and cars from the track. The appellants moved to quash each count of the indictment, which was sustained as to the first and overruled as to the others. Upon a trial by jury, the appellants were found guilty and each sentenced to the State prison for two years. Their motion for a new trial, made at the proper time, was overruled.

The obstruction alleged to have been placed upon the railroad track by the appellants was an iron wedge. Some of the counts in the indictment charged that the appellants feloniously, wilfully and maliciously placed the obstruction upon the track so as to endanger the passage of trains, and in other counts it was charged that they placed the obstruction upon the track in order to throw the engine and cars running upon the railroad from such track. The objection made to each count in the indictment was that it was not averred, nor shown by a statement of the facts, that the iron wedge was of such character and dimensions as to endanger the passage of trains, or to throw the engine or cars from the track. Such averment or statement of facts was not necessary. The crime consists in placing an obstruction upon a railroad track, with the intent to obstruct the passage of trains or to throw the engine or cars from the track. It is sufficient to make the averments substantially in the language of the statute defining the offence. Section 1960, R. S. 1881. We suppose that if the obstruction was apparently sufficient to endanger the passage of trains, or to throw the engine or cars from the track, the offender ought not to be acquitted merely because, through a lack of judgment, he did not provide sufficient means to accomplish his criminal purpose. The nature of the obstruction would, of course, be proper for consideration in determining the question of intent. Where the alleged obstruction was manifestly inadequate to endanger the passage

of a train, or to throw an engine or a car from the track, it might well be supposed that there was no felonious intent in placing it upon the track. But if the obstruction was apparently sufficient for this purpose, the intent, the existence of which is essential to make out the offence, might be inferred, though, in fact, the obstruction was incapable of doing injury. But these are questions of fact. As to the indictment, it is sufficient to charge in appropriate language that the obstruction was placed upon the track with the intent to endanger the passage of trains, or to throw the engine or cars from the track, without giving a description or the dimensions of the obstruction. Each count of the indictment, held good by the court below, was properly so held.

One of the grounds upon which the appellants based their motion for a new trial was the separation of the jury, without leave of the court, after their retirement to deliberate upon their verdict. It appears by affidavits, filed in support of the motion for a new trial, that as many as three of the jurors, at various times during the night, left the room in which they were deliberating, and went down stairs, out of the court-house into the court-house yard, remaining absent each time ten minutes or more. This occurred without leave of court, without the consent of the appellants, and the jurors in thus separating from their fellows were not attended by any officer. In going out and returning, they passed persons standing in the hall of the court-house. The jurors guilty of this misconduct filed affidavits to the effect that during their absence from the room they did not talk to any one, nor did any one talk to them, about the case.

It is the duty of the officer who has charge of the jury "to keep them together in some private and convenient place, without food, except such as the court shall order, and not permit any person to speak or communicate with them, nor do so himself unless by order of the court, or to ask them whether they have agreed upon their verdict, and return them into court, when so agreed, or when ordered by the court." Section 1828, R. S. 1881.

Relative to new trials in criminal cases, section 1842, R. S. 1881, provides:

"The court shall grant a new trial to the defendant for the following causes, or any of them: * * * * *

"*Second.* When the jury has separated without leave of the court, after retiring to deliberate upon their verdict."

When a juror during the deliberation leaves the jury room temporarily for a necessary purpose, attended by the proper officer, the others suspending their deliberations until his return, it can not be regarded as a separation of the jury, or as misconduct of the juror so leaving. But where jurors leave their fellows at will, without leave of court, and without being attended by an officer, and pass out by, or among, other persons, so that it is possible for them to be tampered with or subjected to improper influences, it must be held to be a separation of the jury within the meaning of the statute. In such case the language of section 1842, *supra*, is imperative that the court *shall* grant a new trial. But we are inclined to the opinion that said section 1842 must be construed with reference to the provisions of section 1891, R. S. 1881, which reads:

"In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects, or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

To render an irregularity in the trial of a criminal case harmless in the opinion of the Supreme Court, it must appear satisfactorily that the substantial rights of the defendant were not prejudiced. The question whether there was, in fact, an irregularity is for the decision of the lower court, and in case of conflict of evidence, such decision will be final. But where, as in the present case, the irregularity is shown by the record without question as to its occurrence, it will be presumed by this court, in the absence of an affirmative showing to the

contrary, that it contributed to the conviction, thereby prejudicing the substantial rights of the defendant. The law upon this subject was well stated by FRAZER, J., who delivered the opinion of the court in *Creek* v. *State*, 24 Ind. 151. In that case there had been an unauthorized separation of the jury, but it was shown that the jurors separating themselves from their fellows were subjected to no influences whatever by others, and in no respect attempted to be tampered with. As there were other grounds for the reversal of the judgment, it was not decided whether it should have been reversed on account of the misconduct of the jurors or not. It was said in that case: "The sum of the modern authorities is, that such conduct on the part of jurors is exceedingly reprehensible, and ought to be visited with punishment by the court below; but that where the verdict appears clearly to be right upon the evidence, a new trial will not be granted, but if the correctness of the verdict be doubtful, then such misconduct will result in a new trial. But in all such cases, the misconduct being established, it will impose upon the prosecution the necessity of removing suspicion, by showing, as was done in this case, that the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties."

Where, then, there has been misconduct of jurors, as in the present case, this court must hold that there was error in refusing a new trial, unless it clearly appears:

"1. That the offending jurors were not influenced adversely to the defendant, or in any respect rendered less capable of discharging their duties;" and,

2. That "the verdict clearly appears to be right upon the evidence."

A reasonable doubt upon either one of the above questions, where there has been misconduct of the jury, entitles the accused to a new trial.

The burden of removing the suspicion attending the misconduct of the jurors was imposed on the prosecution. This

was not done in the case before us. The affidavits of the jurors were not broad enough to show that during their absence they were subjected to no influences whatever by others, and in no respect attempted to be tampered with.

If there was no question before us except as to the sufficiency of the evidence to sustain the verdict, we could not reverse the judgment. There was evidence tending to sustain the verdict. In this court this would be sufficient to justify the decision of the trial court in overruling the motion for a new trial, if the question of evidence alone had to be determined. But in view of the misconduct of the jurors, we must determine whether the verdict is clearly right upon the evidence. We can not say that it is. While there was evidence tending to prove the appellants' guilt, there was also evidence tending to prove their innocence. The evidence was sharply in conflict. Considered with reference to the misconduct of the jury and the conflict in the evidence, we are unable to say that the verdict was clearly right.

The State must have relied very largely for conviction upon the evidence of a witness who claimed to have acted as a detective. While there is no legal presumption against the weight of this kind of evidence, we may say, generally, without going into details, that in our opinion the trial court restricted too much the cross-examination of the witness referred to.

Other alleged errors are discussed in appellants' brief, but in most of these we think that the rulings of the court below were clearly right, and in others that no substantial error was committed. The consideration of the questions alluded to need not be more particularly mentioned, as they are not likely to arise in another trial.

Judgment reversed, with instruction to the court below to sustain the appellants' motion for a new trial. The proper order will be given for the return of the appellants to the jailer of the county in which the trial occurred.

Filed May 26, 1884.

No. 11,029.

PARSONS ET AL. *v.* TILLMAN ET AL.

NOVATION.—*Partnership.*—At the instance of some of its creditors, an insolvent partnership was dissolved and a receiver appointed. While the concern was solvent, it became indebted to one of its members by notes, which he surrendered and took new notes, payable to his daughter, and handed them to her as an advancement. She afterwards assigned these to her step-mother, the wife of the creditor partner, for a consideration from him. There was no fraud, and after the insolvency the latter obtained a judgment upon them, and presented it for allowance out of the assets in the hands of the receiver.

Held, that there was a novation by the substitution of the daughter as creditor of the firm, and that her assignee was not to be regarded as assignee of the notes surrendered, and, therefore, the judgment should be allowed as a general debt of the partnership.

From the Vanderburgh Circuit Court.

A. Iglehart, *J. E. Iglehart*, *A. Gilchrist* and *C. H. Butterfield*, for appellants.

C. Denby, *D. B. Kumler*, *A. C. Tanner* and *W. W. Ireland*, for appellees.

NIBLACK, J.—Henry E. Blemker, William H. Tillman and Michael Gorman for many years constituted the firm of Blemker, Tillman & Co., engaged in the manufacture and sale of stoves and other kindred articles of merchandise at Evansville, in this State.

At the time of its dissolution Byron Parsons and Charles E. Scoville were endorsers for the firm in the aggregate sum of more than $20,000.

In May, 1882, Blemker, Parsons and Scoville filed their complaint in the court below against Tillman, Gorman and others, praying, amongst other things, a dissolution of the firm and the appointment of a receiver to close up its business, and the proceedings which followed resulted in the dissolution of the firm and the appointment of a receiver.

On the 28th day of June, 1882, Sophia Tillman, the wife of William H. Tillman, above named, having become the

owner and holder of certain promissory notes executed by the firm to one Mary Raben, her step-daughter, obtained judgment in the superior court of Vanderburgh county against Blemker, Tillman & Co. upon those notes for $3,-581.38. Afterwards Mrs. Tillman filed the judgment thus obtained as a claim against the assets in the hands of the receiver, and asked for an order for its payment as a partnership claim. Parsons and Scoville thereupon, as creditors of the firm, filed objections to the allowance of the claim.

Issues were formed upon the objections thus filed, and at the request of Parsons and Scoville, the circuit court made a special finding of the facts, which may be stated as follows:

That prior to the 14th day of May, 1878, the members of the firm of Blemker, Tillman & Co. made an agreement between themselves by which each was to receive from the firm a compensation for his services, that is to say, Blemker was to be paid $1,500 per year, and Tillman and Gorman each $4 a day; that Blemker and Gorman each drew his wages in cash from the firm, but that Tillman instead took the notes of the firm from time to time for the services which he performed, covering a period of ten years immediately preceding said 14th day of May, 1878, at which time these notes amounted in the aggregate to $3,000; that on that day, desiring to make a gift or advancement to his daughter, Mrs. Mary Raben, Tillman surrendered these notes and had new notes executed by the firm for like amounts, payable to her; that no consideration for these new notes moved from Mrs. Raben either to Tillman or the firm; that two other notes of $200 each were afterwards given to Mrs. Raben by the firm for interest on the notes which her father had caused to be executed to her as above; that in March, 1882, Mrs. Raben transferred all the notes which had been so executed to her by the firm, to the appellee Mrs. Sophia Tillman, who had then but recently become her father's wife; that the only reason for this transfer was that Tillman, the father, had complained at having been compelled to pay the sum of $1,500 as surety

for Mrs. Raben's husband; that at the time the first notes were given to Mrs. Raben the firm owed $49,296.46, and owned property of the value of $70,250.46; that at that time Parsons and Scoville were endorsers for the firm for about $20,000, and so continued up to the time the firm was dissolved, and are now creditors for sums paid as such endorsers for the firm for more than $20,000; that in May, 1882, a receiver was appointed for the firm; that the receiver has converted all the assets into money, and has paid all the money into court; that the creditors of the firm will receive less than fifty cents on each dollar due them; that the judgment constituting the claim in controversy was recovered by Mrs. Tillman on the notes transferred to her by Mrs. Raben, and that there was then due on said judgment, for principal, interest and costs, the sum of $3,630.38.

From these facts the court came to legal conclusions as follows:

First. That at the time of the execution of the notes to Mrs. Raben the firm of Blemker, Tillman & Co. was solvent.

Second. That while the firm was solvent these notes could be lawfully assigned by Tillman, with or without a valuable consideration, they having the ordinary qualities of choses in action.

Third. That the execution of the notes to Mrs. Raben in lieu of those held by her father was a fair transaction, and operated as an assignment of the original notes held by Tillman.

Fourth. That by receiving these notes as a gift from her father, Mrs. Raben acquired a valid title to them, which was not affected by the subsequent insolvency of the firm.

Fifth. That by the transfer of the notes from Mrs. Raben, the appellee Mrs. Tillman acquired a valid title to them in her own right.

Sixth. That the judgment rendered upon these notes ought to be allowed as a general claim against the firm.

Exceptions were reserved, and an allowance was made accordingly.

Parsons and Scoville have appealed, and assigned error upon the conclusions of law at which the circuit court arrived.

Much of the argument submitted on behalf of the appellants has reference to the general relations which partners sustain to the copartnership, and to the rights and liabilities of a partner who has made advancements to an insolvent firm. But we are unable to make any practical application of the principles relied on to the case in hearing. It is inferentially conceded that Tillman, in good faith, performed services sufficient to constitute an adequate consideration for the notes executed to him by the firm, and that these notes in equity afforded evidence of a valid claim upon the partnership assets, as against every one, except creditors other than the partners. It is only contended that Mrs. Tillman ought not to be allowed to occupy a stronger position as a creditor of the firm than her husband would have done if he had continued to hold the original notes, and that for that reason payment of her judgment should be postponed in favor of the other creditors. This contention is based upon the theory that Mrs. Tillman is, in legal effect, only the assignee of her husband in the original notes, and hence chargeable with all the infirmities attaching to him as a creditor of the firm. But in our estimation the facts found by the circuit court do not sustain that theory. The surrender of the original notes by Tillman, and the execution of new notes by the firm to Mrs. Raben, at his request and with her concurrence, amounted to a novation, and a consequent extinguishment of the original indebtedness to Tillman.

Coming to us through the civil law, three kinds of novation are recognized: *First.* When the debtor and creditor remain the same, but a new debt takes the place of the old one. *Second.* Where the debt remains the same, but a new debtor is substituted. *Third.* Where the debt and debtor remain, but a new creditor is substituted. In each of these cases the extinguishment of the old debt constitutes the consideration for the new obligation, and has always been held to be suffi-

cient. 1 Bouvier Institutes, 310; 2 Abbott Law Dict. 184; *Adams* v. *Power*, 48 Miss. 450; 1 Addison Con., section 372, *et seq.*; 1 Parsons Con. 217; *Clark* v. *Billings*, 59 Ind. 508; *McClellan* v. *Robe*, 93 Ind. 298.

The facts of this case bring it within the third and last class of novations, and require us to treat Mrs. Tillman as the assignee of a substituted creditor of the firm, and not as the assignee of her husband.

Accepting this view of the character of Mrs. Tillman's claim, it follows that the circuit court did not err in placing her upon the same footing with other creditors of the firm.

There was enough that was unusual in the several transactions, which led to the rendition of the judgment in favor of Mrs. Tillman, to attract the attention of other creditors, but there is nothing in the special finding of the facts from which an inference of bad faith can be properly drawn, and as no question is made upon the correctness of the special finding, we must assume that the facts as found by it were fairly established by the evidence.

The judgment is affirmed, with costs.

Filed May 26, 1884.

No. 11,292.

TAYLOR *v.* MORGAN.

REDEMPTION.—*Statute Construed.*—*Junior Judgment Creditor.*—*Execution.*—*Sheriff.*—*Levy upon and Sale of Property Redeemed.*—*Rents and Profits.*—*Appraisement.*—*Bid and Bidder.*—Where real estate was sold in fee simple by the sheriff on execution, and was redeemed from such sale by a junior judgment creditor, while the redemption act of March 31st, 1879 (Acts 1879, p. 176), was in force, and where such junior judgment creditor and redemptioner has sued out an execution on his judgment, with the additional recitals therein as provided in section 5 of such act, it is the duty of the sheriff first to levy such execution upon and sell the property redeemed, and the same estate therein redeemed, and at such sale the execution creditor is a forced "bidder for his redemption money, with ten per cent. interest thereon, and all costs accrued since the redemption."

Taylor *v.* Morgan.

In such case the rents and profits of the property redeemed can not be sold, and, therefore, the failure of the sheriff to cause an appraisement of such rents and profits will not vitiate or avoid his sale of the property redeemed.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and *W. A. Branyan*, for appellant.

J. B. Kenner and *J. I. Dille*, for appellee.

Howk, J.—The only error assigned by the appellant upon the record of this cause is the decision of the circuit court in sustaining appellee's demurrer for the want of sufficient facts to his complaint.

The appellant, Charles Taylor, alleged in his complaint that he was the owner in fee and in possession of lot No. 17, in Drover's third addition to the town of Huntington, in Huntington county; that he held such lot under a purchase and conveyance thereof, by deed of general warranty executed to him by Thomas L. Lucas, of the date of May 17th, 1878, said Lucas being then the owner thereof; that, prior to his said purchase, certain judgments had been taken in the Huntington Circuit Court against the said Lucas, the first in date being in favor of the Huntington Building, Loan and Savings Association, the second in favor of one Milton Hendrix, who afterwards assigned his judgment to the appellee, John Morgan; that both of said judgments remained, the first in part and the second wholly, unpaid; that the first judgment provided that the sale of property, under execution or decree issued thereon, might be made without appraisement, while the second judgment did not contain any provision concerning appraisement; that the plaintiff in the first judgment, the Huntington, etc., Association, caused the appellant's lot to be sold by the sheriff on May 7th, 1880, under a writ duly issued and levied thereon, to make the residue of its said judgment; that the appellee Morgan, as the assignee and holder of said second judgment, on February 8th, 1881, before the expiration of the year allowed by law for redemption from

such sheriff's sale, redeemed the appellant's lot from such sale by paying on account thereof, for the use of the first judgment plaintiff, who was the purchaser at such sheriff's sale, the amount of the purchase-money paid, with interest and costs, being the aggregate sum of $430, and the balance due on such first judgment.

And the appellant further said that thereupon the appellee sued out an execution on the said second judgment, for his use as the assignee thereof, and caused the same to be levied by the sheriff of such county on appellant's said lot; that the sheriff caused advertisement to be duly made of a sale under such levy, on June 24th, 1881, over appellant's objections made at the time in appellee's presence and hearing; but the appellant averred that no appraisement whatever was made of the rents and profits of said lot, though such rents and profits were then of the annual value of $100; that the sheriff, on said day, made a pretended sale of appellant's lot to the appellee, Morgan, who, on June 29th, 1881, procured a deed to be executed to him by the sheriff, and caused such deed to be recorded in the recorder's office of such county on the same day, and then claimed to own such lot by virtue of such pretended sale and deed to him; which claim was adverse to the appellant and a cloud upon his title to said lot.

The appellant further averred that at the June term, 1881, of the court below, in a suit there pending, brought by him against the appellee and the sheriff of such county, for the purpose of determining appellant's right to the benefit of certain improvements made by him upon such lot, as against the lien of said judgments, a judgment was rendered adverse to him, and thereupon he appealed said cause to the Supreme Court, and such appeal was there pending at the time the sheriff's sale, sought to be set aside in this suit, was made; that such appeal was not determined in the Supreme Court until the — day of February, 1883, when it was decided adversely to the appellant, and if such decision had been in his favor, it would not have been necessary for him to bring this

suit for the protection of his rights; and that he brought this suit as soon after his said appeal was determined as the sessions of the court below would permit. Wherefore the appellant asked judgment setting aside said pretended sheriff's sale, and the sheriff's deed executed in pursuance thereof, and that his title to his said lot be forever quieted in him, and for all other proper relief.

The record of this cause shows that the suit was commenced on the 9th day of March, 1883. The appellant's complaint is very long, much longer, indeed, than was necessary, we think, for the proper statement of his case. But, as the case made requires an examination, and to some extent the construction, of the redemption laws of March 31st, 1879, and of April 11th, 1881, and as we have reached the conclusion that the complaint is insufficient, we have deemed it proper, and, perhaps, due the appellant, that we should give in this opinion a full and complete summary of the facts stated and relied upon as constituting his supposed cause of action. It will be observed that the appellant makes no objection in his complaint to the sale of his lot by the sheriff to the Huntington Building, etc., Association, nor to the redemption of the lot from such sale thereof by the appellee, Morgan; indeed, we fail to find any objection by the appellant in his complaint to the action of the appellee in suing out an execution upon the Hendrix judgment, of which he was the owner and holder, as alleged, by assignment thereof, or to the levy of such execution by the sheriff upon the appellant's lot.

The first matter of which appellant complained in stating his cause of action was, that "the sheriff caused advertisement to be duly made of a sale under said levy, on the 24th day of June, 1881, over the objection of the plaintiff made at the time, in the presence and hearing of defendant." We are not informed by the appellant, either in his complaint or in the brief of his counsel, what objection was made to the due advertisement of the sale of his lot, or what was the ground of such objection.

The next matter of which complaint is made by the appellant is thus stated: "But plaintiff avers that no appraisement whatever was made of the rents and profits of said lot, though such rents and profits are, and then were, of the annual value of $100; and said sheriff, on said day, made a pretended sale of plaintiff's said lot to the defendant Morgan, who, on June 29th, 1881, procured a deed to be executed to him by such sheriff, and, on the same day, caused said deed to be recorded in the office of the recorder of said county, and now claims to own said lot by virtue of such pretended sale and deed to him, which claim is adverse to plaintiff, and is a cloud upon his title to his said lot."

The facts last quoted are those upon which the appellant claims that he is entitled to have the sheriff's deed to the appellee set aside, as a cloud upon the title to his lot. Of these alleged facts, the one chiefly relied upon is that no appraisement was made of the rents and profits of the lot before the sale thereof by the sheriff to the appellee. The complaint shows that the appellee's redemption of the lot from the sheriff's sale thereof to the Huntington Building, etc., Association, was made on the 8th day of February, 1881, at which time the law of this State for the redemption of real property, etc., from sheriff's sales thereof, was the act of March 31st, 1879. Acts 1879, p. 176. When the sheriff sold such lot to the appellee, on the 24th day of June, 1881, the redemption act of April 11th, 1881, which was in force from its passage, was a law of this State. This latter act contained no repealing clause or section; on the contaary, the last section of such act (section 778, R. S. 1881) expressly provided as follows: "The provisions of this act shall not apply to any sale on execution or decretal order made before the taking effect of this act; but all liens and rights of redemption and re-sale, existing at the passage of this act and growing out of any such sale, may be enforced in like manner as if this act had not been passed, and in accordance with the statute in force when such sale was made. But all sales made after the

passage of this act, and all redemptions therefrom, shall be governed by the provisions of this act."

Under this section of the act of April 11th, 1881, it would seem to be clear that the appellee's right of re-sale of the lot, previously redeemed by him from the first sale thereof, could only be enforced "in accordance with the statute in force when such sale was made," namely, the aforesaid act of March 31st, 1879. In section 5 of this latter act it is provided as follows: "When the judgment creditor shall have redeemed the property sold, he may sue out an execution on his judgment, and shall direct the clerk to, and the clerk shall recite in the execution, in addition to the recitals now required, the judgment on which the sale shall have been made, the sale aforesaid, the redemption or redemptioners, the several amounts paid on redemption, and the dates thereof. The sheriff or other officer executing such writ shall proceed first to levy on and sell the property redeemed as he proceeds in other cases, and the person suing out such writ shall, at the sale under the same, be considered as a bidder for his redemption money, with ten per cent. interest thereon, and all costs accrued since the redemption, and if neither he nor any other person bid more, he shall be deemed the purchaser for that sum, and from the proceeds of sale shall be first paid the amount due for redemption."

Under these statutory provisions the questions for decision in the case in hand are these: Was it the duty of the sheriff, under the execution sued out by the appellee, to cause an appraisement to be made of the rents and profits of the appellant's lot, for a term of years not exceeding seven? Or did the failure of the sheriff to cause such rents and profits to be appraised vitiate the sheriff's sale of the lot to the appellee, and entitle the appellant to have such sale set aside? We are of the opinion that each of these questions ought to be and must be answered in the negative. It was "the property redeemed," and not the rents and profits of such property, which the statute required the sheriff "first to levy on

and sell." It was "the property redeemed," and not the rents and profits of such property, at the sheriff's sale of which the statute made the appellee a forced bidder "for his redemption money, with ten per cent. interest thereon, and all costs accrued since the redemption." It was the duty of the sheriff, under the statute, "first to levy on and sell" the precise property redeemed; and it was the further duty of the sheriff, at such sale, to consider the execution plaintiff as his first bidder, and the minimum amount of his bid was clearly prescribed. "If neither he nor any other person bid more," the statute says, "he shall be deemed the purchaser for that sum." The purchaser of what? Surely, of "the property redeemed," for that is what the sheriff is required first to levy on and sell, and of which the statute makes him the purchaser in the absence of any other bidder.

That this is the proper construction of the above quoted provisions of section 5 of the act of March 31st, 1879, is conclusively shown, as it seems to us, by this additional provision of the same section, namely: "The title acquired under such sale shall take effect as if there had been no redemption, and if there be no redemption from the sale under such writ, the conveyance made in pursuance thereof shall have effect as if it had been made in pursuance of the first sale." Where the lot is sold in fee simple at the first sale, and is redeemed by a judgment creditor, who afterwards sues out execution on his own judgment, and, by virtue thereof, the sheriff levies upon and re-sells "the property redeemed," how could the conveyance made under the second sale "have effect as if it had been made in pursuance of the first sale," unless it was intended that the same property and the same estate or interest therein, sold and redeemed from under the first sale, should first be the subject of levy and sale under the execution sued out by the redeeming judgment creditor?

In the case at bar the appellee redeemed the appellant's lot in fee simple from the sheriff's sale thereof to the Hunting-

ton Building, etc., Association. At the time of such redemption, the appellee, as the assignee of the Hendrix judgment, was a judgment creditor of the appellant. When the appellee, after his redemption, sued out an execution on the judgment held by him as assignee, such execution, with the additional recitals therein required by the statute, was in the nature of a writ of *venditioni exponas*. This writ commanded the sheriff first to levy on and sell "the property redeemed," not a part of such property, and, surely, not a less estate or interest therein than the estate or interest redeemed. At such sale the statute made the appellee a forced bidder, for a specified bid, and, if no one bid more, made him the purchaser of "the redeemed property," but, surely, of nothing less; for the statute expressly declares that the conveyance, made in pursuance of such second sale, "shall have effect as if it had been made in pursuance of the first sale," when the lot was sold in fee simple.

Our conclusion is that upon the facts of this case and a fair construction of the provisions of the redemption act of March 31st, 1879, applicable thereto, the sheriff was not authorized or required, by the execution sued out by the appellee, to offer or sell the rents and profits of "the redeemed property," or any less estate or interest therein than the fee simple estate redeemed. This being so, it can not be held that the sheriff's failure to cause an appraisement to be made of the rents and profits of "the redeemed property" vitiated the sheriff's sale to the appellee, or entitled the appellant to have such sale set aside. The law never requires the performance of an unnecessary act.

The demurrer to the complaint was correctly sustained.

The judgment is affirmed, with costs.

Filed May 26, 1884.

95 464
197 244

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No. 11,442.

THE STATE *v.* MARKINS ET AL.

CRIMINAL LAW.—*Incest.*—*Evidence.*—On the trial of an indictment for incest, after evidence of incestuous intercourse had been introduced, the State offered to prove prior acts of indecent familiarity and sexual connection between the parties, for the purpose of strengthening the evidence already in.

Held, that it was error to exclude the offered evidence.

From the Vigo Circuit Court.

J. W. Shelton, Prosecuting Attorney, *D. N. Taylor*, *J. G. McNutt* and *S. R. Hamill*, for the State.

S. C. Davis, *S. B. Davis*, *G. E. Pugh* and *H. C. Pugh*, for appellees.

ELLIOTT, C. J.—The indictment charges the appellees with having committed the crime of incest on the 6th day of March, 1882, and the State introduced evidence of incestuous intercourse on that day. After the introduction of this evidence the State offered to prove that prior to that time acts of indecent familiarity took place between the appellees, and that they had been guilty of sexual intercourse. At the time this evidence was offered, the prosecuting attorney stated to the court that the purpose in offering it was not to prove distinct and substantive offences, but to prove lascivious and improper conduct between the defendants prior to March 6th, 1882. The court excluded the evidence, and that ruling is properly presented for our consideration.

The purpose for which the evidence was offered having been stated to the trial court, the inference that it was offered generally, and without any limitation as to the object of the prosecutor in offering it, is fully rebutted. The question for our decision is, therefore, whether it was competent for the purpose for which the State informed the court it was offered.

In *Lovell* v. *State*, 12 Ind. 18, it was held that evidence of acts of sexual intercourse subsequent to the time laid in the indictment, and identified by the evidence introduced by the

State was incompetent, and it is confidently asserted that the decision in that case governs the present. But the cases are very different. Previous acts of lascivious familiarity would tend strongly to show the commission of the specific offence charged by the State, for it is impossible to doubt that evidence of such a character tends to make it probable that the parties did commit the specific offence charged. Such evidence goes in proof of the main offence, because it is evidence of the probability of its perpetration. Where the acts precede the offence, they constitute the foundation of an antecedent probability; but where they follow the main offence their force and effect are materially different. It is one thing to affirm that evidence of prior incestuous intercourse is competent, and another thing to affirm that evidence of subsequent sexual intercourse is not competent; it is, therefore, not difficult to discriminate between the two cases.

It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous. It can not be doubted that it is competent to show the previous intimacy between the persons charged with the crime of incest, their behavior toward each other and their acts of impropriety and indecency. If it be proper to show acts of indecent and lascivious character, then, surely, it must be proper to show the act to which all such indecent and lascivious acts lead, and in which they will often culminate. It can not be held, upon any principle of law or logic, that the State may show acts of improper intimacy up to the very act of sexual intercourse, and then must stop, although the sexual intercourse is but the usual result of the previous lascivious conduct. If the course of conduct tends to show that the in-

cestuous intercourse charged in the indictment did take place, then, surely, the culminating act of sexual commerce must be evidence of a convincing character. It would be a singular rule that would admit evidence of lascivious conduct, and yet exclude evidence of the act, which of all the series supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the State might show previous lascivious conduct, but must not show an act of sexual intercourse, we should have the singular anomaly of a legal rule rejecting evidence simply because of its strength and importance. The usual rule of common sense, as of law, is, that the more material the evidence and the stronger its probative force the greater the reason for holding it to be competent.

The intercourse between the sexes which constitutes the prime element in the offences of adultery, fornication, incest and seduction, can only take place by the concurrence of two persons of opposite sexes, and the previous lascivious conduct of the parties is evidence of their disposition to indulge their lustful passions. The probability that a woman will yield to the embraces of a man to whom she has before submitted, or to whom she has for a long time allowed improper familiarities, is much stronger than if it appear that no intimacy had existed between the parties, and the woman's conduct had always been modest and discreet. The disposition of the parties involved in the crime becomes an element of importance, and the disposition of the woman is shown by her conduct toward the man with whom she joins in violating the law. It is but natural to infer that a woman, whose conduct has been immodest and licentious, will be more likely to sin than one whose conduct has been modest and discreet. A truth recognized by the ordinary sense and experience of mankind was well expressed when it was said: "You will more readily infer assent in the practiced Messalina, in loose attire, than in the reserved and virtuous Lucretia."

The general rule undoubtedly is, that one crime can not be proved in order to establish another independent crime, but

this rule does not apply to cases where the chief element of the offence consists in illicit intercourse between the sexes. The decisions all agree that the cases growing out of illicit commerce between the sexes are not within the general rule. In the case of *People* v. *Jenness*, 5 Mich. 305, it was held that evidence of other acts of sexual intercourse was competent in prosecutions for incest. The case was fully argued, and the opinion is an able one. We quote from it the following: "Previous familiarities, not amounting to actual intercourse, but tending in that direction, must have a strong bearing in all cases of this kind; and we can discover no just principle on which they could have been excluded, without setting at defiance the common sense of mankind. Such evidence was given in this case by the father and mother of the girl, without objection from the defendant; and if such familiarities may be shown because they *tend* to prove actual intercourse, or to corroborate other evidence of such intercourse, upon what principle can previous *actual intercourse* be rejected, when offered for the same purpose? It is the principal and most important act of familiarity, to which the others only tended."

The general rule which governs the class of cases to which the present belongs is thus stated in *Lawson* v. *State*, 20 Ala. 65: "In all cases, whether civil or criminal, involving a charge of illicit intercourse within a limited period, evidence of acts anterior to that period may be adduced in connection with, and in explanation of, acts of a similar character occurring within that period, although such former acts would be inadmissible as independent testimony, and, if treated as an offence, would be barred by the statute of limitations." This statement of the rule is substantially borrowed from the text-writers. 2 Greenl. Ev., section 47; Whart. Crim. Ev., section 35. In discussing the general subject, the Supreme Court of Massachusetts said: "The intent and disposition of the parties towards each other must give character to their relations, and can only be ascertained, as all moral qualities are,

from the acts and declarations of the parties. It is true, that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact. An adulterous disposition existing in two persons towards each other is commonly of gradual development; it must have some duration and does not suddenly subside. When once shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties." *Thayer* v. *Thayer*, 101 Mass. 111. The court from whose opinion we have quoted formerly held a different doctrine, and Mr. Bishop, in the course of a sharp criticism upon that holding, said: "But strangely enough the Massachusetts court further held, on an indictment for adultery, that, if the anterior familiarities extend so far, or are of such character as to show adultery actually committed on this previous occasion, the evidence of them—that is, of the previous adultery—is not admissible: according to which doctrine, if the evidence is a little weak, yet tending remotely to establish the crime, it may be submitted to the jury; but, if it is a little stronger and tends more clearly to the same result, it must be excluded!" Bishop Stat. Crimes, section 680.

In *State* v. *Bridgman*, 49 Vt. 202, S. C., 24 Am. Rep. 124, very many authorities are reviewed, and it was held, in an opinion of much force, that evidence of former acts of sexual intercourse is admissible. Among the later cases declaring this general doctrine are *State* v. *Pippin*, 88 N. C. 646, and *State* v. *Kemp*, 87 N. C. 538.

The court erred in excluding the evidence offered by the State, and the appeal is sustained, at the costs of the appellees.

Filed May 26, 1884.

No. 11,402.

WILTSE *v.* HOLT.

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FALSE IMPRISONMENT.—*Justification.*—*Marshal.*—*Constable.*—To an action for false imprisonment against a marshal or constable, an answer, that the defendant found the plaintiff on the street intoxicated, and having just assaulted a citizen, and arrested and detained him three hours until he became sober, when a criminal charge was regularly made before a justice, and the plaintiff fined, etc., is good on demurrer.

From the Rush Circuit Court.

W. A. Cullen and *B. L. Smith*, for appellant.

J. Q. Thomas and *J. J. Spann*, for appellee.

NIBLACK, J.—Action by Drury Holt, Jr., against Oliver Wiltse, Nathan J. Foust and J. Murray Rawls, for false imprisonment.

Wiltse answered separately in three paragraphs. The second paragraph was in general denial, and the first and third set up special matters in defence, to which demurrers were severally sustained.

The plaintiff obtained a verdict and judgment against Wiltse for the sum of $198, but failed in his action against Foust and Rawls. Wiltse, appealing, complains only of the decisions of the circuit court sustaining demurrers to the first and third paragraphs of his answer.

The first paragraph averred that on the 24th day of November, 1882, the time at which the appellee complained that he was unlawfully arrested and imprisoned, he, the said defendant Wiltse, was the duly elected, qualified and acting marshal of the town of Carthage, an incorporated town of the county of Rush, in this State; that on that day the appellant found the appellee within the corporate limits of said town in a state of intoxication; that not to exceed two minutes before the appellant had so found the appellee, the latter had entered the office of one Bogart, in said town of Carthage, and assaulted and violently beaten him, the said Bogart, having at the same time a pistol upon his person which he

tried to use upon said Bogart; that the appellant, having knowledge that the appellee had previously threatened the life of Bogart, and hearing the disturbance in the latter's office, and seeing the appellee emerge from the office in an intoxicated condition, and wild with excitement and anger, arrested him, and put him in a lock-up, informing him that as soon as he became sufficiently sober he, the appellant, would take him before a justice of the peace and prefer charges against him; that within three hours after his arrest the appellee was taken before a justice of the peace, where a charge was preferred against him for an assault and battery upon the said Bogart, to which he, the appellee, pleaded guilty, and for which he was adjudged to pay a fine.

The third paragraph set up, substantially, the same facts, except that it averred that the appellant, in arresting the appellee, acted as a constable of the township.

Section 1702, R. S. 1881, provides that "All judicial officers, sheriffs, deputy sheriffs, coroners, constables, marshals, deputy marshals, police officers, watchmen, and conductors of all trains carrying passengers or freight within this State, while on duty on their respective trains, may arrest and detain any person found violating any law of this State, until a legal warrant can be obtained."

By section 5976 of the same statute, it is made the duty of a constable "To act as conservator of the peace, and apprehend, and take, forthwith, before the nearest justice, all who violate the law in his presence, and there charge them with such violation on oath."

A peace officer preserves the peace by preventing crime, as well as by causing it to be punished after it is committed, and in case of a breach of the peace it is his duty not only to put an end to the breach, but, when necessary, to make an arrest as a means of restraining the offender. When such an officer, for good cause, makes an arrest, he may adopt such usual measures as may be necessary for the safekeeping of the prisoner, without detaining him an unreasonable time. Smith

Sheriffs, Coroners and Constables, 38; *Boaz* v. *Tate*, 43 Ind. 60; *Dœring* v. *State*, 49 Ind. 56 (19 Am. R. 669).

We have no brief from the appellee, and hence nothing pointing out specific objections to the paragraphs of answer before us. These paragraphs are quite voluminous, and the facts they contain might have been pleaded, perhaps, with greater compactness and certainty, but, construed with reference to the statutory provisions above set out, and to the other authorities cited, we see no substantial objection to their sufficiency.

Upon the facts as averred, the assault and battery upon Bogart was, in legal contemplation, in the presence of the appellant, and the condition of the appellee, at the time, was such as to render him, in all respects, a fit subject for arrest and detention until his intoxication should subside.

In view of his condition his detention was not for an unreasonable length of time.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed May 26, 1884.

No. 11,658.

Siebert *v.* The State.

Criminal Law.—*Assault.—Assault and Battery.—Intent.—Indictment.—Duplicity.*—Where the defendant is charged in technical terms, in a single count, with an assault, and an assault and battery, with the intent to commit a felony, for each of which offences the same punishment is prescribed in section 1909, R. S. 1881, there is no such duplicity therein as will afford sufficient ground for quashing the indictment.

Same.—*Change of Judge.—Change of Venue.—Affidavits and Counter Affidavits. Bill of Exceptions.—Error.—Supreme Court.*—Where applications are made to the trial court for either a change of judge or a change of venue from the county, the affidavits and counter affidavits filed in connection therewith must be made parts of the record by a bill of exceptions, or the rulings thereon will not constitute such errors as can be considered by the Supreme Court.

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SAME.—*Prosecuting Attorney.—Additional Counsel.—Discretion of Trial Court.* It is in the discretion of the trial court to allow additional counsel to assist the prosecuting attorney in the prosecution of a criminal cause, and, unless the record affirmatively shows an absolute abuse of such discretion, the Supreme Court will not be authorized to review its exercise.

SAME.—*Idem Sonans.—Names.—Question of Fact.*—Whether two names of slightly variant orthography are, or are not, *idem sonans*, is a question of fact for the jury, and not of law for the court.

SAME.—*Instructions.*—The instructions of the trial court to the jury are construed by the Supreme Court with reference to each other, and as an entirety; and if, thus construed, the entire instructions present the law fairly and correctly, and are not calculated to mislead, the judgment will not be reversed thereon, even though a single expression, detached from its context, might be erroneous.

SAME.—*Merger.—Jurisdiction of Justice of the Peace.—Former Acquittal or Conviction.*—An assault, or an assault and battery, is merely a misdemeanor, but, when committed with the intent to commit a felony, it becomes itself a felony wherein the misdemeanor is merged; and, as a justice of the peace has no jurisdiction to try and acquit or convict a defendant charged with a felony, when the jury find him guilty of the felonious intent charged, then it becomes the duty of the jury, without regard to the proceedings before the justice, to convict the defendant of the felony charged in the indictment.

From the Criminal Court of Allen County.

S. R. Alden, for appellant.

F. T. Hord, Attorney General, *C. M. Dawson*, Prosecuting Attorney, *H. Colerick* and *W. S. Oppenheim*, for the State.

HOWK, J.—The indictment against the appellant in this case contained two counts. In the first count it was charged "that, on the 13th day of October, A. D. 1883, at the county of Allen and State of Indiana, William Siebert did then and there unlawfully, feloniously, purposely, and with premeditated malice, attempt to commit a violent injury upon the person of John Tonges *alias* Johann Tonges, he, the said William Siebert, then and there having the present ability to commit a violent injury upon the person of the said John Tonges *alias* Johann Tonges, and him, the said John Tonges *alias* Johann Tonges, did then and there unlawfully, felo-

niously, purposely, and with premeditated malice, in a rude, insolent and angry manner, strike, beat, bruise and wound, with a heavy piece of plank, with the felonious intent him, the said John Tonges *alias* Johann Tonges, then and there, and thereby, to feloniously, purposely, and with premeditated malice kill and murder."

The second count of the indictment differs from the first count only in this, that it charges the appellant to have committed the assault, and the assault and battery, "with the endgate of a wagon," with the felonious intent, etc.

Appellant's motions to quash each count of the indictment, and for a change of judge, and for a change of venue from the county, were severally overruled by the court, and to each of these rulings he excepted. Upon arraignment, he entered his plea that he was not guilty as charged. The issues joined were tried by a jury, and a verdict was returned, finding him guilty of an assault and battery, with intent to commit murder in the second degree, as charged in the indictment, and that he be imprisoned in the State prison for the period of two years, and fined in the sum of one dollar. Over his motions for a new trial and in arrest of judgment, the court rendered judgment against him in accordance with the verdict.

The first error complained of by the appellant is the overruling of his motion to quash each count of the indictment, for the following specified causes:

"1. That neither count of the indictment states with sufficient certainty the offence for which he is held;

"2. That each count of the indictment charges two separate offences; and,

"3. For duplicity in each count of the indictment."

It is manifest that it was intended to charge the appellant in each count of the indictment with the commission of the felony which is defined, and its punishment prescribed, in section 1909, R. S. 1881. This section provides as follows: "Whoever perpetrates an assault or an assault and battery upon any human being, with intent to commit a felony, shall,

upon conviction thereof, be imprisoned in the State prison not more than fourteen years nor less than two years, and be fined not exceeding two thousand dollars." An assault merely is defined in section 1910; an assault and battery is defined in section 1911; and the particular felony, which it is charged the appellant had the intent to commit, namely, murder in the first degree, is defined in section 1904, R. S. 1881.

It will be observed that in each count of the indictment the appellant is charged, in accurate and technical language, with an assault, and, also, with an assault and battery, with the felonious intent, etc. For this reason, it is earnestly insisted by the appellant's counsel, that each count of the indictment is bad for duplicity, and the motion to quash the same ought to have been sustained. A similar objection was urged to the fourth count of the indictment in *Dickinson* v. *State*, 70 Ind. 247. The court there said: "The first objection urged by the appellant's counsel to the sufficiency of the fourth count of the indictment, in argument, is its duplicity, in this, that it charged the appellant, in technical terms, with an assault and also an assault and battery, with the felonious intent, etc. We are of the opinion, however, that this objection afforded no sufficient ground for quashing the fourth count of the indictment; for the defect complained of is one which could not and did not 'tend to the prejudice of the substantial rights of the defendant upon the merits.' 2 R. S. 1876, p. 387. The charge of an assault is included in the charge of an assault and battery; and if the appellant had been charged only with an assault and battery, with the felonious intent, he might have been convicted of an assault merely, with or without the intent, according to the evidence. *The State* v. *Prather*, 54 Ind. 63; *Jones* v. *The State*, 60 Ind. 241."

In section 1756, R. S. 1881, it is provided, in substance, that no indictment shall be deemed invalid, nor shall the same be set aside or quashed, for any defect or imperfection therein, "which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Where the de-

fendant is charged, in a single count, with the commission of two offences growing out of one and the same transaction, the one of which in legal effect is included in the other, both defined in the same section of the statute, and both subject to precisely the same punishment, it can not be correctly said, we think, that such duplicity in the count, if such it be, would or could tend to the prejudice of the substantial rights of the defendant upon the merits. We recognize the doctrine that in criminal pleading there can be no joinder of separate and distinct offences in one and the same count. *Knopf* v. *State*, 84 Ind. 316; *State* v. *Weil*, 89 Ind. 286. But the doctrine in question is not applicable, as it seems to us, to such cases as *Dickinson* v. *State*, *supra*, or the case in hand.

Our conclusion is, therefore, that no such error was committed by the trial court, in overruling the appellant's motion to quash either count of the indictment, as would justify or authorize the reversal of the judgment.

The next errors complained of in argument are the overruling of appellant's motions for a change of judge, and for a change of venue from the county. Neither of these supposed errors is so saved in or presented by the record of this cause that it can be considered and passed upon by this court. The record shows that the motion for the change of judge was made upon affidavit, and that, when it was overruled, twenty-five days were given the appellant "in which to settle and file his bill of exceptions herein." It is also shown by the record that appellant's motion for a change of venue from the county was based upon affidavits filed, and that the prosecuting attorney filed the counter affidavits of certain persons; and that, when the motion was overruled, thirty days were given the appellant "in which to file his bill of exceptions herein." The transcript filed in this court does not contain either of these bills of exceptions, and it fails to show that either of such bills was ever signed or filed in the lower court. Such affidavits and counter affidavits can only be made parts of the record on appeal by bill of exceptions or by an order

of the court. *Horton* v. *Wilson*, 25 Ind. 316; *Smith* v. *Smith*, 77 Ind. 80. The clerk has copied into the transcript the appellant's individual affidavits, but the other affidavits and counter affidavits are not to be found therein. The overruling of these motions were proper causes for a new trial, and were improperly assigned as independent errors. *Berlin* v. *Oglesbee*, 65 Ind. 308, and cases cited. But as they were assigned as causes for a new trial in appellant's motion therefor, we have considered them in the order adopted by counsel. *Kennedy* v. *State*, 37 Ind. 355.

Appellant's counsel next complains, in argument, that an attorney of the trial court was hired by one of the witnesses for the State, who was the uncle of the prosecuting witness, to prosecute the appellant in this cause, and was permitted by the court, over the appellant's objections, to examine witnesses and make the opening and closing arguments in said cause, with the consent of the court, the prosecuting attorney assisting in the prosecution of the cause, and being present during the entire time, and in no wise incapacitated to prosecute said cause. This is the substance of what is shown by the bill of exceptions in regard to the matter complained of. The cause assigned by the appellant for a new trial, which we suppose was intended to present the matter complained of for the consideration of the trial court and of this court, was substantially as follows: "Error of law occurring at the trial of said cause, in this, that the court, over the objection and exception of this defendant, permitted * * an attorney practicing at the bar of said court to assist in the prosecution of said cause, and make the opening and closing arguments for the State, without having been appointed or authorized by the court, or requested by the State or its prosecuting attorney so to do."

If it were conceded that the matters stated in this cause for a new trial constituted such an error of law as would authorize or require the granting of such new trial, if shown to be true, yet it is clear that the truth of such matters is not shown

by the bill of exceptions, or in any other legal manner, in the record of this cause; for it nowhere appears in the record that the attorney referred to was not "requested by the State, or its prosecuting attorney," to aid in the prosecution of the cause; and it does appear by the bill of exceptions that the attorney referred to examined witnesses and made the opening and closing arguments in the cause, "with the consent of the court," and the consent of the court necessarily implies the authority of the court. In this court the statement of facts in a cause for a new trial is not regarded as true unless its truth is shown by a bill of exceptions properly in the record. *Graeter* v. *Williams*, 55 Ind. 461; *Hyatt* v. *Clements*, 65 Ind. 12; *Heckelman* v. *Rupp*, 85 Ind. 286. Besides, the record fails to show in any manner, by affidavit or otherwise, that the action of the court, in permitting the attorney named to assist the prosecuting attorney, injured the appellant in any way or to any extent. Finally, we are of opinion that the question under consideration must be left to the discretion of the trial court; and that, where the action of the court in this regard is complained of, the complaining party must show by the record, positively and affirmatively, an absolute abuse of such discretion, and that he was injured thereby, before this court will be authorized to review such action. There is no such showing in the record of the case at bar. *Wood* v. *State*, 92 Ind. 269.

It is next insisted on behalf of the appellant that the trial court erred in refusing to give the jury, at his request, the following instruction: "Proof that the alleged injury was committed on a person who spells his name J-o-h-n T-o-e-n-g-e-s or J-o-h-a-n-n T-o-e-n-g-e-s, does not support the allegation that it was committed on a person who spells his name John Tonges or Johann Tonges; therefore, if you find from the evidence that the offence charged in the indictment was committed by the defendant on a person who spells his name John Toenges or Johann Toenges, there would be a variance between the name of the person charged in the in-

dictment to have been injured and the proof, and you should acquit the defendant."

There certainly was no error in the refusal of the court to give this instruction. It assumes as matter of law that, by reason of the difference in the orthography of the names Tonges and Toenges, they are of necessity not *idem sonans*. Whether or not the two names, by reason of the slight variance in their respective orthography, were *idem sonans* or were not of the same sound, was a question of fact for the jury, and not of law for the court. *Smurr* v. *State*, 88 Ind. 504.

Appellant's counsel says: "Instruction No. 4, given by the court, is unquestionably error of such nature as to prejudice defendant's rights on the merits. A bare reading of the instruction is argument enough." We have read the instruction complained of, indeed, we may say that we have read it several times; for it is a literal copy of the statutory definition of murder in the second degree, in section 1907, R. S. 1881. We fail to see any error in this instruction, and the appellant's counsel has failed to point out the "unquestionable error" therein.

Appellant's counsel further says: "The court also charged the jury that 'A reasonable doubt is such a doubt, as the jury are able to give a reason for;' thus," says counsel, "imposing on jurors a readiness of analysis and expression, that universal experience demonstrates impossible to expect or require." We are not certain that we understand what counsel means by his criticism of a single expression, in a long instruction, detached from its context. We have quoted, from the brief of counsel, all that he has said of the expression, singled out from the instruction for his criticism. While we are in doubt as to what counsel means by his criticism, we do not doubt that his mode of criticising a single detached expression, taken from a long instruction, is one not to be favored or approved. It is well settled that the instructions of a court to a jury are to be construed with reference to each

other, and as an entirety. *Eggleston* v. *Castle*, 42 Ind. 531; *Kirland* v. *State*, 43 Ind. 146 (13 Am. R. 386); *McCulley* v. *State*, 62 Ind. 428. This rule is especially applicable to cases, such as the one in hand, where a detached expression from a single instruction is complained of. Construed in conformity with this rule, the instruction, from which counsel excerpts the expression commented upon by him, contains a fair and correct statement of the doctrine of reasonable doubt.

An elaborate argument is made by the appellant's counsel, for the purpose of showing that the verdict of guilty, as to the felonious intent, was not sustained by sufficient evidence. We have carefully read and considered the evidence, and have reached the conclusion that the case is not one in which we, as an appellate court, can or ought to disturb the verdict of the jury, or reverse the judgment of the trial court, merely upon the evidence. There is no clear defect, no link gone or too weak in the chain of facts which tend to establish the appellant's guilt of the felony, wherewith he was charged. "The jury found the verdict upon the evidence, and the court has sanctioned it by its judgment; and, though the evidence does not completely satisfy us, we can find no error in the law, and know of no judicial rule by which we can reverse the judgment pronounced below." *Cox* v. *State*, 49 Ind. 568. *Kelly* v. *State*, 64 Ind. 326; *Christy* v. *Holmes*, 57 Ind. 314.

It is urged with much earnestness, on behalf of the appellant, that the court erred in its refusal to give the jury, at his request, the following instruction: "If the defendant has been arrested on a sufficient affidavit, filed before a justice of the peace having jurisdiction, charging an assault and battery, and the evidence further shows that said assault and battery, so charged in said affidavit, is the same charged herein and on the same person, that, on said affidavit, the defendant was arrested, arraigned and pleaded not guilty, and the cause was submitted for trial and evidence offered touching the matters alleged in said affidavit, and the cause con-

tinued for further hearing, then you should not convict the defendant of an assault and battery herein."

In the same connection appellant's counsel also complains of the action of the court in giving the jury an instruction, to the effect that if after a careful and dispassionate consideration of all the proof and circumstances in evidence before them, they had a reasonable doubt as to whether the accused was guilty of an assault and battery, with the felonious intent to commit murder either in the first or second degree, or voluntary manslaughter, then they should consider whether he was guilty of simple assault and battery, and if, from a careful consideration of all the evidence before them, they believed beyond a reasonable doubt that the defendant was guilty of an assault and battery simply, they should so find by their verdict.

It is certain, we think, that the court did not err in refusing to give the jury the instruction asked for by the appellant, because it did not contain a correct statement of the law applicable to the case then on trial. If the jury found from the evidence that the defendant was guilty of the felonious intent charged in the indictment, then, no matter what they might find in reference to the proceedings had before the justice of the peace, it became their duty upon the evidence to convict the defendant of an assault and battery, with such felonious intent. This is so, because a justice of the peace, under our law, has no jurisdiction to either acquit or convict a defendant charged with a felony, his only authority in such a case being that of an examining court to hear and discharge, or commit and bind over, the defendant to appear before a court having jurisdiction to try the case. This point is settled by the decision of this court in the case of *State* v. *Hattabough*, 66 Ind. 223. The instruction asked was properly refused. *State* v. *Morgan*, 62 Ind. 35.

As to the instruction of the court to the jury in reference to their verdict, in the event they found the defendant not guilty of any felonious intent as charged, it is manifest that

the instruction, even if erroneous, did not in any manner injure the defendant; for, as the jury found the defendant guilty of the felonious intent, it is certain that the instruction complained of did not influence or induce the verdict. We do not find it necessary, therefore, to consider or pass upon such instruction, because, even if it be erroneous, the error was harmless.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed May 26, 1884.

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No. 11,532.

Long et al. v. The State.

Criminal Law.—*Misconduct of Juror.*—*New Trial.*—To make the fact available as cause for a new trial, that a juror took notes of the evidence and read them in the jury room, no objection having been made, it must appear that not only the defendant, but also his attorney, was not aware that the juror took notes.

Same.—*Verdict.*—*Practice.*—Neither the affidavit of a juror nor his statements can be used to overthrow a verdict.

Same.—*Supreme Court.*—*Evidence.*—Where the court below hears evidence on a motion for a new trial on account of the misconduct of a juror, the Supreme Court will not weigh the evidence.

Same.—*Misconduct of Witness.*—The misconduct of a witness for the State is not cause for a new trial.

Same.—*Duty and Conduct of Judge.*—A judge presiding at a criminal trial is not a mere moderator, but has active duties to perform, without partiality, in seeing that the truth is developed, and to that end he may put proper questions to witnesses.

Same.—*Evidence.*—It being a question whether the defendants were present when the shots were fired, evidence that one of them was shortly after seen not far away getting over his back fence, and being asked what was the matter, said, "It's Dave and S.," the name of the party into whose house the shots were fired, is proper as against himself.

Same.—*Instructions.*—The giving by the court to the jury of forms of verdict applicable in case of conviction, none being asked or given applicable to acquittal, is not error.

Long *et al. v.* The State.

SAME.—*Assault and Battery.—Harmless Error.*—Upon an indictment for assault and battery, with intent to commit murder in the first degree, the jury so found, assessing the lowest penalty allowed by section 1909, R. S. 1881.

Held, that an erroneous instruction, defining the case proved as evincing an intent to commit murder in the first degree, instead of an intent to commit manslaughter, was harmless.

From the Shelby Circuit Court.

J. C. Hart, E. K. Adams and *L. J. Hackney*, for appellants.

F. T. Hord, Attorney General, *F. S. Staff*, Prosecuting Attorney, *A. F. Wray, B. F. Love, D. L. Wilson, A. Major, H. C. Morrison* and *W. B. Hord*, for the State.

ZOLLARS, J.—In September, 1883, a ball, fired from a gun or pistol, entered the house of Samuel H. Saulsberry, and wounded his child. As the authors of the injury, appellants were tried, convicted and sentenced to an imprisonment of two years, upon an indictment which charged them with assault and battery with intent to kill and murder.

Two of the causes urged for a new trial below, and upon which appellants' counsel lay much stress here, are that one of the jurors took notes of the evidence, and used them in the jury room in influencing the jury. These questions were presented by affidavits and an oral examination of the juror. The affidavit by appellants was, that, without their knowledge or consent, the juror made notes of the evidence adduced upon the trial, and, while the jury were deliberating upon their verdict, read said notes to them, and that the notes so made were thus used to the injury of appellants. It is not developed in this affidavit by what means, or from what source, appellants learned that the notes had been thus used, or that they had been so taken by the juror.

To meet this affidavit were the affidavit and oral examination of the juror, and some of his associates. In these the accused juror stated that without any objections from the court or the parties he made notes of some points of the evidence in his own words, neither preserving the names nor language

of the witnesses; that he did not read any of the notes to his fellow jurors, and that they neither read, considered, nor referred to such notes, nor any others. He stated that on one or two occasions, when the jurors were talking of the evidence, he looked over a part of his notes to see if they agreed with the recollections of the other jurors and his own, as to what the evidence on certain points had been; that he made no statements of any kind to the other jurors in relation to the notes, and that his verdict was not at all influenced by the notes, but that he relied upon his memory independent of them.

Another juror, in an affidavit filed below, stated that the jury neither read nor heard read notes of the evidence taken by any juror, or any other person, and that the verdict of the jury was based wholly upon their recollection of the evidence, unaided by any kind of notes.

Did then the taking of notes of the evidence by the juror, under the circumstances, vitiate the verdict?

We are cited by counsel for appellant to the following cases: *Newkirk* v. *State*, 27 Ind. 1; *Eden* v. *Lingenfelter*, 39 Ind. 19; *Lotz* v. *Briggs*, 50 Ind. 346; *Nichols* v. *State, ex rel.*, 65 Ind. 512; *Cheek* v. *State*, 35 Ind. 492.

In the first of the above cases, the judgment was reversed, because, without consent of the parties, the jury, after they had retired to deliberate upon their verdict, requested and received from the bailiff a volume of Bishop's Criminal Law, from which counsel had read on the argument.

In the others, except the last, it was held error for the court to allow the jury, over the objections of a party, to take to their room documentary evidence.

In the last case, two of the jurors, over the objections of the defendant, and after the court told them they must not do so, persisted in writing down notes of the evidence.

It will be observed that in the first of the above cases the misconduct of the jury was such that the defendant could not object, because not present, and that in the others the misconduct was over the objections of the party complaining.

If that complained of as misconduct had been with the knowledge and consent of the parties, or with their knowledge and without objection, it would not have been available error for the reversal of the judgments. *Cluck* v. *State*, 40 Ind. 263. Does it sufficiently appear in the case at bar that the juror made the notes of the evidence, and took them to the jury room, without the knowledge and consent of appellants?

Appellants in their affidavit state that it was done without their knowledge and consent, but it is not in any way made to appear that it was without the knowledge and consent of their attorneys. The record shows that their attorneys were present, conducting their defence from the inception of the trial to the final judgment. If the attorneys had such knowledge, that knowledge must be imputed to appellants. It would hardly do to hold that verdicts may be overthrown, because a juror may take notes of the evidence without the personal knowledge of a party, although his attorneys may all the while have full knowledge, and make no objection, either to the taking of the notes, or the taking of them to the jury room. The only reasonable and safe practice in such cases is to hold the party bound by the knowledge, omissions and acts of his attorney. The necessity of such a rule must be apparent. The purpose of the employment is that the attorney may watch and guard the rights of the party in the progress of the cause. The attorney, with his experience and knowledge of court affairs, will detect what would not be observed by the party. It is difficult to understand how a juror could take notes of the evidence in a case without detection by the attorneys.

Our views are fully sustained by the case of *Eastman* v. *Wight*, 4 Ohio St. 156. In that case a new trial was asked because of the incompetency of one of the jurors. In support of the motion, the party filed his affidavit that he had no knowledge of such incompetency during the trial. There was nothing to show that his attorney did not have such knowledge. The new trial was denied. The Supreme Court held that it

was correctly denied, on the ground that the knowledge of the attorney is the knowledge of the party, and that the want of knowledge on the part of the attorney must be made to appear affirmatively. The same rule was applied to a criminal case. *Parks* v. *State*, 4 Ohio St. 234. See *Achey* v. *State*, 64 Ind. 56. The same rule has been applied in Massachusetts. *Kent* v. *City of Charlestown*, 2 Gray, 281; *Orrok* v. *Commonwealth Ins. Co.*, 21 Pick. 456. Other cases from other States might be cited.

In the case in hearing there is nothing to show a want of knowledge on the part of appellants' attorneys of the conduct of the juror. If we are correct in our holding, that the knowledge of the attorney is the knowledge of the party, it results that the want of such knowledge must be affirmatively shown, as well as the want of personal knowledge by the party. To adopt a contrary rule would surround jury trials with uncertainty and hazard by enabling parties to experiment with juries and courts. In support of the verdict, therefore, we must presume, in the absence of a showing to the contrary, that appellants' attorneys had knowledge of the fact that the juror made notes of the evidence, and took them to the jury room, and made no objections. Where there is knowledge and no objections, in such a case, consent will be presumed. *Cluck* v. *State*, 40 Ind. 263. Under the circumstances of this case, the fact that the juror looked over portions of his notes once or twice in the jury room is not such an error as would justify a reversal of the judgment.

It is clearly stated in the affidavits of Duval, the juror who took the notes of the evidence, and another juror, that none of the jury, except Duval, in any way consulted the notes in the jury room, or even saw them.

It is also stated that, in arriving at a verdict, the jury relied wholly upon their memories as to what the evidence was, and were in no way influenced by the notes. The only thing in any way in conflict with this is the affidavit of one of appellants' attorneys, in which he states that one of the jurors

told him that Duval read from his notes to one or two of the jury.

The law is well settled that the affidavits of jurors may be used to support and uphold the verdict, but not to overthrow and destroy it. This being so, it follows that what any juror may say can not be used to overthrow the verdict. *Stanley* v. *Sutherland*, 54 Ind. 339; *Withers* v. *Fiscus*, 40 Ind. 131 (13 Am. R. 283); *Haun* v. *Wilson*, 28 Ind. 296; *Hughes* v. *Listner*, 23 Ind. 396; *Jones* v. *State*, 89 Ind. 82.

Another rule is also well settled, viz.: Where a motion for a new trial is based upon the alleged misconduct of jurors, and the trial court hears evidence, either orally or by affidavits, touching such misconduct, its conclusions will not be disturbed by the Supreme Court on the weight of the evidence. *DePriest* v. *State, ex rel.*, 68 Ind. 569; *Holloway* v. *State*, 53 Ind. 554.

Another general rule is that the misconduct of the jury must be gross, and clearly appear to have injured the complaining party, to justify the granting of a new trial. *Ball* v. *Carley*, 3 Ind. 577; *Bersch* v. *State*, 13 Ind. 434; *Harrison* v. *Price*, 22 Ind. 165; *Whelchell* v. *State*, 23 Ind. 89; *Flatter* v. *McDermitt*, 25 Ind. 326; *Medler* v. *State, ex rel.*, 26 Ind. 171; *Achey* v. *State*, 64 Ind. 56; *Carter* v. *Ford Plate Glass Co.*, 85 Ind. 180.

The fifteenth cause assigned in the motion for a new trial is stated as follows: "Misconduct of the plaintiff by her witness, Samuel Douthett, in concealing from the defendants important evidence in their behalf, and in intimidating Nathan Young, a competent and important witness for defendants on the trial of said cause, as shown by the affidavits of James Young and Nathan Young filed herewith." This presents no question for the consideration of the court. Douthett was not even the prosecuting witness, as that term is ordinarily used. The prosecuting attorney is the representative of the State in such State prosecutions. By his acts and wrongs in such cases, the State will be bound, but it is not

bound or chargeable with the wrong and misconduct of its witnesses. Besides, in this case, the affidavits of the Youngs charging wrong upon Douthett, are squarely contradicted by him. These affidavits presented an issue for the decision of the court below. With that decision we can not interfere. *DePriest* v. *State, ex rel., supra; Holloway* v. *State, supra.*

Another reason assigned for a new trial, and urged upon our attention, is that the court erred in asking a question of Addie Surrier, one of the State's witnesses. After this witness had testified that she was at her mother's gate across the street from Saulsberry's at the time of the shooting, and saw a person running west just after the shooting, and that she could not say who it was, the court asked her this question: "At the time you saw that person running, and not from what you have heard, did you think it was Dave Long?" To which the witness answered: "I took it to be Dave Long at the time. I could not say for certain who it was now; the man was running fast," etc.

It was not an available error for the court to put the question in the leading form. Counsel argue with much earnestness that the question by the court should have been limited to the time when asked, and should not have inquired as to what the witness thought at the time she saw the man running; and that the question indicated to the jury that the court thought that the defendants were guilty, and should be convicted.

For the purpose of testing the witness, and getting at the truth, we think that the court had the right to ask her what her impressions were at the time. The theory of the defence was that appellants were not at or near Saulsberry's house, and hence did not do the shooting. The question by the court was to throw light upon that disputed fact. It is the duty of the presiding judge to see that the truth is developed, and for this purpose he has the right to propound proper questions to witnesses. Of course, he should scrupulously avoid all semblance of partiality. There was nothing in

the question, we think, to in any way indicate to the jury that the judge had either any opinion or wish in the matter. It should be observed, too, that the answer of the witness was not such as to materially affect the case either way.

W. C. Davis, a witness for the State, testified that he lived two hundred yards north from Saulsberry's house, and heard the shots. After hearing screams he started in the direction of Saulsberry's house. When he had reached the corner of the lot upon which appellant George Long lived, he saw him getting over the fence back of his house, and asked him what was the matter, to which Long answered: "It's Dave and Saulsberry." The question seems to have been asked and answered without objection from the defendants. Following the answer they moved to strike it out.

We think the question and answer were both competent and proper. The answer, perhaps, would not bind the other defendant, if "Dave" referred to him. If a question and answer are competent as to one of the defendants, they can not be struck out because they may be incompetent as to the other. In such case the answer must stand, and should be limited to the one defendant by a proper instruction. And in such case, if the party wishes the answer so limited, he should ask for such an instruction. *Elliott* v. *Russell*, 92 Ind. 526. As to George Long, his answer showed that he had knowledge of the affair, and tended, in a slight degree at least, to show that he was present at Saulsberry's house at the time of the shooting as one of the parties.

In charging the jury the court submitted forms of verdict to be used in case they found the defendants guilty, but submitted no form to be used in case the jury found them not guilty. It is contended that this omission indicated to the jury that the court believed the defendants guilty, and wished them convicted; that the jury so understood it, and were influenced by it.

The affidavit of jurors *pro* and *con* were filed. As said before, the affidavits of jurors can not be used to overthrow

their verdict. If appellants wished an additional form of verdict submitted to the jury, it was their duty to have prepared one and asked the court to submit it. When a party thinks that additional instructions should be given, he should ask them to be so given. *Powers* v. *State*, 87 Ind. 144; *Hodge* v. *State*, 85 Ind. 561.

It is contended further that the fifth instruction given by the court was erroneous. It is said by counsel: "We think in the case put by the court with this (our statute) in view, the defendants could not have been found guilty of an assault and battery with intent to commit murder in the first degree; it could only have been with intent to commit manslaughter."

We need not set out the instruction, nor extend this opinion in a discussion of the point made by counsel, as the error, if an error be conceded, was and is entirely harmless to appellants. They were given the shortest sentence known to the statute. Section 1909, R. S. 1881. Hence, whether the jury convicted them of an assault and battery with intent to commit murder, or manslaughter, can make no possible difference to them. *John* v. *Clayton*, 1 Blackf. 54; *Taylor* v. *State*, 49 Ind. 555. Upon the question discussed by counsel, see *Walker* v. *State*, 8 Ind. 290. Under the indictment charging them with assault and battery with intent to commit murder, they might be convicted of a like assault and battery with intent to commit manslaughter. *State* v. *Throckmorton*, 53 Ind. 354.

Lastly, we are asked to reverse the judgment upon the weight of the evidence. We have examined the evidence, and find the case to be just such an one as calls for the application of the rule so often announced, that this court will not reverse a judgment upon the weight of the evidence, where it tends to sustain the finding or verdict, and where it is conflicting. The reason of the rule is apparent to any one upon a moment's thought. It was very well and forcibly stated in the case of *Cox* v. *State*, 49 Ind. 568.

The evidence in the case before us is in sharp conflict on

some points. The jury and the trial court had the witnesses before them, and hence had the means of judging of the weight that should be given to the testimony of each particular witness, which it is impossible for us to have. This court has more than once announced that the rule is not for the trial courts. This is manifest, because the reasons for it do not exist there. It is true the Constitution gives to the jury in criminal cases the right to determine the law and the facts, but it does not follow from this that, in ignorance, they may trample the law under their feet, or from mistake, bias or prejudice, disregard the facts. The trial judge does not preside simply as a moderator; it is his duty to charge the law, and see to it that proper heed is given by the jury.. It is equally his duty to see to it that the laws are rigidly enforced against the guilty, and that in no case shall an innocent person suffer. Such also is the duty of this court. From that duty it will in no case shrink or turn aside. This court, however, is a court for the correction of errors, and before we can pronounce judgment, overthrowing the judgments of the lower courts, the error must be made to affirmatively appear by the record. As has already been said, it is difficult for us to know and judge of the weight of the evidence, for the reason that it is impossible to put into the record the manner and conduct of the witnesses, and the many indices of truth and falsehood that often accompany the delivery of the testimony by the witnesses.

After a careful examination of the record, we find no error for which the judgment should be reversed; it is, therefore, affirmed, with costs.

Filed May 27, 1884.

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No. 11,147.

FLEETWOOD ET AL. *v.* THE DORSEY MACHINE COMPANY.

PRACTICE.—*Interrogatories.—Discretion of Court.*—The court may, but need not, in its discretion, receive interrogatories to be put to the jury, after the argument has begun.

SAME.—*Instructions.—Supreme Court.*—Where the instructions given are not in the record, alleged error in refusing instructions asked is not available.

CONTRACT.—*Consideration.—Conditional Sale.—Promissory Note.*—A contract for the payment of money, showing the actual consideration to be an article of personal property, and stipulating that the purchaser's title is dependent upon such payment, will support a complaint thereon for recovery of the money.

SAME.—*Warranty.—Evidence.*—Evidence of a verbal warranty will not sustain a plea alleging a written warranty.

SAME.—*Pleading.— Rescission.— Tender.*—In an action to recover for the price of an article sold, where the defence is a breach of warranty and rescission, the answer should allege either that the property had been tendered back, or that it was worthless.

PRACTICE.—*Answers to Interrogatories.—Judgment Non Obstante.*—Where the answers to interrogatories are irreconcilable with the general verdict, the former must prevail.

From the Decatur Circuit Court.

J. K. Ewing and *C. Ewing*, for appellants.

J. D. Miller and *F. E. Gavin*, for appellee.

ELLIOTT, C. J.—The foundation of the appellee's complaint is the following contract:

"GREENSBURGH, IND., August 4, 1880.

"On or before the 1st day of September, 1881, we promise to pay to the order of the Dorsey Machine Company, one hundred and fifty dollars with interest at six per cent. from date, and with annual interest at eight per cent. from maturity on the amount then due, until paid, and attorney's fees, payable without relief from valuation or appraisement laws, at the banking office of the Citizens National Bank. The express condition of the sale and purchase of the Dorsey Reaper and Mower, for which this note is given, is such that the title, ownership, or possession does not pass from the

Dorsey Machine Company until this note and interest is paid in full; and the Dorsey Machine Company have full power to declare this note due, and to take possession of said Dorsey Reaper and Mower at any time they may deem themselves insecure, even before the maturity of the note. And it is further agreed that this note shall be deemed due on demand if the maker attempts to move out of the county where he now resides."

There was no error in sustaining appellee's demurrer to the fifth paragraph of appellants' answer, for the reason that the same evidence which it would have entitled them to give was admissible under other paragraphs of the answer which were left standing.

The trial court may, if it so elects, receive interrogatories to be propounded to the jury, after the commencement of the argument. It is not bound to receive them, but may, in its discretion, do so. *Truitt* v. *Truitt*, 37 Ind. 514; *Glasgow* v. *Hobbs*, 52 Ind. 239.

The instructions given by the court are not in the record, and we can not say that those refused were not properly embodied in those given. In order to make a question on the ruling refusing instructions, it is necessary to incorporate in the record all the instructions given by the court.

It will not do to put in the record a detached part of the instructions. The rule is that instructions are to be construed together and not separately.

The contract on its face shows a consideration and one sufficient to support it. Where parties by their agreement fix a consideration, and the one party gets all he contracted for, and the other yields all he agreed to yield, the courts will sustain the contract. If any other rule were adopted, it would result in courts making contracts for the parties, and this would be an unjustifiable usurpation of authority. *Wolford* v. *Powers*, 85 Ind. 294; S. C., 44 Am. R. 16; *Hardesty* v. *Smith*, 3 Ind. 39; *Harvey* v. *Dakin*, 12 Ind. 481; *Baker* v. *Roberts*, 14 Ind. 552; *Smock* v. *Pierson*, 68 Ind. 405; S. C.,

34 Am. R. 269; *Neidefer* v. *Chastain*, 71 Ind. 363; S. C., 36 Am. R. 198; *Williamson* v. *Hitner*, 79 Ind. 233. The complaint, therefore, shows a valid contract, and as the answers of the appellants were all affirmative, it devolved upon them to make out some one of the defences pleaded.

The first paragraph of the answer sets forth a written warranty, and, in order to sustain this paragraph, it was necessary to show that the warranty was in writing. *Johnston Harvester Co.* v. *Bartley*, 81 Ind. 406; *Morgan* v. *Gaar, Scott & Co.*, 64 Ind. 213. A pleading founded on a written contract is not sustained by evidence of a verbal one.

The second paragraph of the answer avers that the consideration of the contract was the sale and delivery of a Dorsey Self-Rake Reaper and Mower, which was warranted to be constructed of certain specified materials and to work in a specified manner, but that it did not work as warranted, nor was it constructed of the materials described in the warranty, and that the appellants gave notice of the breach of warranty and tendered back the machine.

It has been very frequently decided by this court, that a pleading is to be construed according to its general scope and tenor, and that mere general conclusions from facts specifically pleaded can not have controlling effect. *Petty* v. *Trustees, etc.*, *ante*, p. 278; *Johnston* v. *Griest*, 85 Ind. 503; *Mescall* v. *Tully*, 91 Ind. 96; *Platter* v. *City of Seymour*, 86 Ind. 323; *Jackson School Tp.* v. *Farlow*, 75 Ind. 118; *Neidefer* v. *Chastain*, *supra*; *Judy* v. *Gilbert*, 77 Ind. 96 (40 Am. R. 289); *Kimble* v. *Christie*, 55 Ind. 140. The paragraph of the answer under immediate mention is one for rescission of contract, and a very material fact alleged, and which it was necessary for appellants to prove, was that they had tendered back the machine sold and delivered to them.

It is perfectly well settled that where a party seeks a rescission, he must tender back the property received by him if it be of value. *Robards* v. *Marley*, 80 Ind. 185; *Vance* v. *Schroyer*, 79 Ind. 380; *DeFord* v. *Urbain*, 48 Ind. 219.

This paragraph of the answer could only be sustained, even giving the appellants the benefit of the greatest presumption that can be indulged in favor of the pleading, by evidence that the article had been tendered back to the vendor, or that it was without value. *Wynn* v. *Hiday*, 2 Blackf. 123.

The fourth paragraph of the answer also admits the sale and delivery of the reaper, but avers that there was a verbal contract to the effect that the reaper should operate in a certain manner, and that this verbal agreement was the sole consideration of the contract. In order to sustain this paragraph it was necessary for the appellants to prove that the consideration of the note was the verbal contract described.

Where a defendant admits the cause of action set forth in the complaint, he must prove one or more of the defences he sets up in avoidance, or fail. He can not insist that he might have recovered upon some other issue than that tendered by his pleadings, for a party can only recover upon the issues his pleadings make. The chief purpose of pleading is to secure definite issues for trial, and a judgment can only be demanded upon matters within the issues. As the plaintiff's claim was confessedly valid, it must prevail unless the appellants have overthrown it.

We have thus fully stated and examined the issues joined, for they exert a controlling influence upon the decision of the case. The appellants had a general verdict in their favor, and in answer to interrogatories the jury found the following facts: 1. The principal and interest of the note were $181.35; the attorney's fees $25. 2. The consideration of the note was "one Dorsey Self-Rake Reaper and Mower." 3. There was no written warranty. 4. The reaper was not tendered back to the appellee. 5. It was of value. It appears, therefore, that there was no written warranty, and this, of itself, settles the issue presented by the first paragraph of the answer against the appellant. But, in addition to this, it is found that the reaper was of value, and was not tendered back. The answer confesses that there was a delivery of the

machine, and it was not necessary to find what was expressly confessed by the pleading.

The answers to the interrogatories are directly against the appellants on the issue tendered by the second paragraph, for they find that the property was of value, and that it was not tendered back to the appellee. Our cases, and there are very many of them, agree in holding that if the article is of value the vendee must restore, or offer to restore it, to the seller. *Wynn* v. *Hiday*, *supra*; *Lafayette Agricultural Works* v. *Phillips*, 47 Ind. 259; *Johnson* v. *McLane*, 7 Blackf. 501 (43 Am. Dec. 182); *Neidefer* v. *Chastain*, *supra*.

We must decide the case as it is made by the parties; we can not change the pleading nor limit its effect. We are not to enquire what would have been a sufficient answer, but we take the answer as it is written, for by the pleading which a party tenders he is bound. The theory of the pleading under immediate discussion required proof of two material facts, which are directly found not to exist. The question is not whether a plea might not have been so framed as to have allowed the appellants to retain the property and recoup damages, but the question is, what is the legal scope and effect of the plea? If the answer is good, it is so because of the facts it pleads, and if the evidence fails to prove these facts, the defence fails.

The answers to interrogatories find that the consideration stated in the fourth paragraph of the answer was not the consideration for the contract, and this, of course, prevents a judgment on that paragraph.

We have shown that the issues presented by the several paragraphs of the answers are fully settled against the appellants by the facts stated in the answers to interrogatories, and it must follow from this that the general verdict in their favor must give way. It is true that a general verdict will prevail unless there is an irreconcilable conflict between it and the answers to interrogatories. There is here a conflict that can not be reconciled. With all the facts of the complaint con-

fessed, and all the issues presented by the answer directly overthrown by the facts stated in the answers of the jury, it is impossible that a reconciliation can be effected between the general and the special finding of the jury. With all the defences borne down, there is no foundation for the general verdict to rest on.

It is argued by appellants' counsel that as the contract gave the appellee a right to retake the property, it conferred upon them a like privilege of annulling the sale. If counsel were right in their assumption, the conclusion which they deduce would not follow; for, granting the correctness of the assumption that the appellants are entitled to annul the contract, it would not follow that the right to annul could be exercised without restoring the property received under the contract. As well might the appellee claim a right to retake the property and still enforce the note in full, as for the appellants to claim that they may annul the contract and yet retain the property it vested in them. Judgment affirmed.

Filed May 27, 1884.

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No. 10,445.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY *v.* PIERCE.

SUPREME COURT.—*Informal Demurrer.*—Where it appears from the record that the parties and trial court understood a certain demurrer to be addressed to a certain pleading to question its sufficiency, the Supreme Court, on appeal, will so regard the demurrer, notwithstanding it may have been informal.

RAILROAD.—*Killing Stock.—Failure to Fence.—Negligent Killing.—Counter-Claim.*—In an action against a railroad company, to recover for the value of a horse killed by the defendant's cars, wherein one paragraph of the complaint was based upon the defendant's failure to fence its track, and another alleged a negligent killing, the defendant could not set up, by way of counter-claim, that the plaintiff had negligently suffered his horse to stray upon the track, where the cars ran upon it, and were thrown from the track, causing the defendant great damage, for which judgment was demanded.

The Terre Haute and Indianapolis Railroad Company *v.* Pierce.

SAME.—*Presumption.*—See opinion for facts authorizing presumption of the killing of the animal by the defendant's cars.

SAME.—*Venue.*—*Evidence.*—*Presumption.*—Where such action is based upon the failure of the company to fence, it must be brought in the county where the killing occurred, but when it is based upon alleged negligence, it may be brought in any county through which the railroad runs. If such action be based on both these grounds, the Supreme Court, in the absence of evidence of the venue, will presume that a general finding or verdict was based upon the paragraph alleging negligence.

SAME.—*Judicial Notice.*—*Venue.*—The Supreme Court takes judicial cognizance of county boundaries, and that a certain distance from a place named in a county is within that county. *Louisville, etc., R. W. Co.* v. *Breckenridge*, 64 Ind. 113, on this point, overruled.

SUPREME COURT.—*Evidence.*—*Harmless Error.*—Where a material fact is established by competent and uncontradicted evidence, the Supreme Court will not reverse the judgment because some incompetent evidence was admitted on the same point.

From the Parke Circuit Court.

J. G. Williams, *A. F. White* and *E. Hunt*, for appellant.

V. Carter, for appellee.

HAMMOND, J.—Complaint in three paragraphs by the appellee against the appellant and two other railroad companies, for the alleged killing of a horse by the appellant, as lessee of a railroad running from Terre Haute, Indiana, to Rockville, Indiana. The appellee's right to recover was based, in the first and third paragraphs of his complaint, upon the failure of the appellant to fence securely the railroad at the place where the animal entered upon the same and was killed. The second paragraph seeks to recover upon the ground of negligence.

The appellant's answer was in two paragraphs. The first was a general denial. The second was a counter-claim, stating, as we copy from the appellant's brief, the following facts:

"That Pierce was the owner of a horse well known to be breachy; that he carelessly and negligently permitted him to run at large, and carelessly failed to provide suitable enclosures to keep his stock upon his own premises; that this horse,

being the same one for whose value the suit is brought, entered upon the track of appellant in the town of Rosedale and wandered along the track between the fences on either side, until it came to a bridge, where it remained until one of the appellant's trains approached, and thereupon the horse attempted to run through the bridge, and, falling between the ties, obstructed the track so that appellant's locomotive was thrown from the track through the bridge down into the creek, together with several loaded freight cars, by reason of all of which appellant was damaged in the sum of $5,000.

"The counter-claim further alleges that there was no order of the board of commissioners of Parke county permitting horses or cattle to run at large, and that appellant was wholly without fault or negligence, and that Pierce, although often requested, fails and refuses to pay the damages."

The other defendants answered by the general denial. The finding and judgment being in their favor, they will not be further noticed.

The appellee demurred to the counter-claim as follows:

"Comes now the plaintiff, and for reply to the second paragraph of the answer of the defendant, the Terre Haute and Indianapolis Railroad Company, demurs to said answer for the reason that said paragraph does not state facts sufficient on answer herein."

Trial by the court; finding for the appellee as against the appellant, and judgment on the finding, over the appellant's motion for a new trial.

The appellant assigns as errors the sustaining of the demurrer to its counter-claim, and the overruling of its motion for a new trial.

It is objected to the demurrer that it was so defective in form as not to present any question as to the sufficiency of the counter-claim. The demurrer is quite informal, and had the court below overruled, or wholly disregarded it, it is probable that there would have been no error for which the appellee could complain. It appears, however, from the record,

that the parties and the court below understood the demurrer as being addressed to the counter-claim. Thus addressed, we think it was sufficient, in substance, to call in question the sufficiency of the facts stated in the counter-claim to constitute a cross demand against the appellee. *Petty* v. *Board, etc.*, 70 Ind. 290; *Mark* v. *Murphy*, 76 Ind. 534.

Had the facts stated in the counter-claim been set up as an independent cause of action by the appellant as plaintiff, against the appellee as defendant, the complaint would no doubt have been good upon demurrer. *Sinram* v. *Pittsburgh, etc., R. W. Co.*, 28 Ind. 244.

The difficult question is whether, in an action like the present, for a trespass, another trespass, resulting in an injury to the defendant, can be pleaded by way of counter-claim. It is provided in the third clause of section 347, R. S. 1881, that "The defendant may set forth in his answer as many grounds of defence, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered."

Section 350, R. S. 1881, defining a counter-claim, is as follows: "A counter-claim is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages."

We do not think the cause of action set forth in the counter-claim was a matter arising out of or connected with the appellee's cause of action. The appellee's cause of action, as stated in two paragraphs of his complaint, grew out of the appellant's failure to fence its railroad where the animal entered and was killed. His cause of action, as stated in the other paragraph of his complaint, was based upon the appellant's negligence in killing the animal. The appellant's cause of action, or cross demand, set forth in its counter-claim, was based upon the appellee's negligence in suffering his horse to run at large, whereby said horse strayed upon the appellant's

railroad, causing to the latter the injury for which compensation is claimed in the counter-claim. It is too apparent for controversy that the appellee's negligence in permitting his horse to run at large, did not grow out of, and had no connection with, the appellant's failure to fence its road, nor with its negligence in running its locomotive and cars over and killing the appellee's horse. The respective acts of negligence complained of had no connection with or relation to each other.

The decisions of this court have been uniformly adverse to permitting one trespass to be pleaded as a counter-claim or set-off to another. *Conner* v. *Winton*, 7 Ind. 523; *Lovejoy* v. *Robinson*, 8 Ind. 399; *Slayback* v. *Jones*, 9 Ind. 470; *Shelly* v. *Vanarsdoll*, 23 Ind. 543; *Roback* v. *Powell*, 36 Ind. 515; *Frout* v. *Hardin*, 56 Ind. 165 (26 Am. R. 18); *Hess* v. *Young*, 59 Ind. 379. These decisions are in harmony, generally, with those of other States having codes similar to ours; though there are a few decisions holding to the contrary. See Pomeroy Rem., section 790, and authorities there cited. These exceptional decisions, holding that a counter-claim in a case like the present is allowable, are the ones principally relied upon by the appellant to support its counter-claim.

It is not quite true, as has been sometimes stated, that a counter-claim is only admissible in actions *ex contractu*. To the contrary, we think that the decisions of this court show that in some actions *ex delicto*, a counter-claim growing either out of contract or tort may be pleaded. But an examination of these cases will show that the matters stated in the complaint and the counter-claim arose out of the same transaction, and that such transaction related to a contract of some kind between the parties. A reference to some of these cases will now be made.

Judah v. *Trustees, etc.*, 16 Ind. 56, was an action against the defendant to recover the value of certain bonds and coupons received by him as attorney for the plaintiff, and converted to his own use. That was an action sounding in tort,

known at common law as an action of *trover*. 1 Chit. Pl. 146. The defendant answered by counter-claim that the bonds and coupons in controversy were retained under contract with the plaintiff for legal services rendered by the defendant. It was held that the case admitted of the counter-claim. It will be noticed that the cause of action stated in the complaint and the matter set up in the counter-claim both related to and grew out of the same transaction, or contract, namely, the employment of the defendant by the plaintiff as attorney, and the defendant's claim for compensation for services under such employment.

In *Grimes* v. *Duzan*, 32 Ind. 361, the plaintiff brought an action to set aside, for fraud, a conveyance made by him to the defendant. The defendant answered by counter-claim, setting up title under his deed from the plaintiff, charging the plaintiff with being in the unlawful possession of the land, and asking to have his title quieted, and for possession. The complaint and counter-claim were both founded in tort. The counter-claim was held good. Here, also, it will be observed that both causes of action grew out of the transaction of the plaintiff's conveyance to the defendant.

The cases are too numerous to mention, where it has been held in actions on promissory notes and other contracts, that a counter-claim was admissible, setting up a cross demand on account of the plaintiff's fraud with respect to the consideration of the note or contract sued upon. All these cases differ materially from those first above cited where, as in the present case, the *tort* set up by way of set-off or counter-claim had no connection with the tort for which the suit was brought, and no relation to a prior contract. We think there was no error in sustaining the demurrer to the counter-claim.

The appellant's motion for a new trial stated as causes therefor, that the finding was not sustained by sufficient evidence, and was contrary to law; also, that there was error in the admission of certain evidence.

The appellant claims that there was no evidence author-

izing a finding that the appellee's horse was killed by actual collision with any train. The evidence shows that the horse, the day after he was missed by the appellee, was found dead under the railroad bridge, being cut in two, and that there was blood and hair on the ties of the bridge above the place where the horse was found. These circumstances, with others given in evidence, were sufficient to raise the presumption that the horse was killed by a railroad train.

It is also urged that the evidence does not show that the horse was killed in Parke county. An action against a railroad company for killing stock, on account of its road not being fenced, is local, and must be brought in the county where the injury occurred. Sections 4026 and 4029, R. S. 1881. But an action against a railroad company for killing stock through negligence is transitory, and may be brought in any county through or into which such railroad passes. Section 311, R. S. 1881; *Detroit, etc., R. R. Co.* v. *Barton*, 61 Ind. 293. While two paragraphs of the appellee's complaint sought to recover on the ground of the appellant's road not being fenced, one paragraph was based upon the appellant's negligence. As the finding of the court does not show upon which paragraph of the complaint it was predicated, we would, perhaps, in the absence of proof as to the venue, have to presume that the finding was on the paragraph of the complaint alleging negligence. But, however this may be, we think that the record contains sufficient evidence to show that the injury happened in Parke county. The testimony establishes the fact that the injury occurred at a bridge on a railroad operated by the appellant one mile north of Rosedale. This court takes judicial notice of the geography of the country. 1 Works Pr., section 348. And we judicially know that a point on the railroad one mile north of Rosedale would be in Parke county. In *Indianapolis, etc., R. R. Co.* v. *Moore*, 16 Ind. 43, which was an action for killing stock at a place where the railroad was not fenced, the proof showed that the injury took place between Shelbyville and London, one and a quarter miles from

London. It was held that the evidence sufficiently showed that it was in Shelby county. *Louisville, etc., R. W. Co.* v. *Breckenridge*, 64 Ind. 113, cited by the appellant, is at variance with the weight of authority upon the question now under consideration, and as to this point said decision is hereby overruled.

The evidence admitted over the appellant's objection, and for which he urges a reversal of the judgment, related to the appellant operating the railroad at the time of the injury. Independent of the evidence which may have been improperly received, the proof was ample and uncontradicted that the appellant, as lessee, was at the time named operating the railroad as alleged in the complaint. Had there been a conflict of evidence upon this point, the admission of some of the evidence complained of might have constituted an error that would require us to reverse the judgment. But where, as in this case, a fact is sufficiently proved by competent evidence, we must hold that, where there is no evidence to the contrary, the admission of additional, incompetent evidence in support of the same fact is, at most, a harmless error, which will not authorize a reversal. The motion for a new trial was properly overruled.

Judgment affirmed, at appellant's costs.

ZOLLARS, J., concurs in the conclusion, but doubts the correctness of what is said upon the question of counter-claim under our statute.

Filed May 27, 1884.

95 502
124 406

95 502
130 432

95 503
148 682

No. 10,933.

RUNNELS ET AL. *v.* KAYLOR ET AL.

JUDGMENT.—*Correction of Misdescription of Land Ordered Sold in Decree of Foreclosure.—Amendment.—Parties.—Practice.*—The amendment of a clerical error in a judgment entry is made summarily on motion, and a motion for a new trial therein is not warranted; it can only be done at the instance of a party to the record and upon clear evidence that the entry, by reason of clerical error, does not show the judgment actually

pronounced by the court. A purchaser of lands upon a decree of foreclosure or his assignee has no standing to make the motion to correct the description of the lands directed to be sold.

From the Huntington Circuit Court.

J. B. Kenner and *J. I. Dille*, for appellants.

J. T. Alexander and *J. M. Hatfield*, for appellees.

NIBLACK, J.—About the year 1870, Levi Runnels died seized of an eighty-acre tract of land which descended to his widow, Hannah Runnels and his children, Charles W. Runnels, Maria Runnels, Levi S. Runnels and Madeline Runnels. On the 15th day of February, 1873, Hannah Runnels, the widow, executed a mortgage to John F. Runnels on what purported to be a part of the tract of land of which her husband had so died seized, to secure the payment of a note for $350. Soon afterwards the widow intermarried with one James C. Haley.

On the 20th day of May, 1875, John F. Runnels filed his complaint in the Huntington Circuit Court against the said Hannah Haley, and her husband James C. Haley, and the said Charles W. Runnels and others, children of the decedent, named as above, alleging the non-payment of the note, and praying judgment and the foreclosure of the mortgage.

The complaint averred that the mortgaged land was "described in said mortgage as the undivided east third ($\frac{1}{3}$) of the south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section sixteen (16), township twenty-nine (29) north, range nine (9) east, in Huntington county, Indiana. Whereas it should be described as the undivided one-third of the south half of the southeast quarter of section sixteen (16), township twenty-nine (29) north, range nine (9) east, in Huntington county, in the State of Indiana; and plaintiff further says, that it was the intention of said Hannah Haley, when she executed said mortgage to this plaintiff, to cover and convey her entire interest in all of said real estate thereby; and the said plaintiff further shows the court that since the execution of said mort-

gage, to wit, on the 17th day of March, A. D. 1874, said south half (½) of said southeast quarter of said section sixteen was partitioned and divided, the interest therein of said Hannah Haley by an order and decree of this court being set apart to her; that said real estate of the said Hannah Haley so set apart to her by virtue of said partition is described as follows, to wit: Commencing at the northeast corner of said south half; thence ten chains to a stone; thence west ten (10) chains to a stone; thence north five (5) chains to a stone; thence west thirty-five (35) chains to a stone; thence west thirty chains to the west line of said south half; thence north five (5) chains to the northwest corner of said south half; thence east forty (40) chains to the northeast corner of said south half to the place of beginning, containing twenty-five acres, more or less." Wherefore the complaint demanded a reformation and correction of the mortgage as well as its foreclosure.

At the hearing, the court rendered a personal judgment against Mrs. Haley for $185 and decreed a foreclosure of the mortgage and a sale of the mortgaged land.

The decree of foreclosure and sale, as entered by the clerk, described the land according to the description contained in the mortgage, making no reference to the demand for the reformation and correction of the mortgage.

On the 15th day of March, 1882, Daniel Kaylor filed his motion in writing, setting forth the foregoing facts, and averring that the circuit court made a finding that the mortgage ought to be reformed and corrected, and that the failure of the decree to order its reformation and correction was the mere mistake of the clerk in entering it; also averring that since said decree had been entered the mortgaged land had been sold at sheriff's sale under it, and David A. Ream had become the purchaser of the same; that after receiving a sheriff's deed for the land so purchased by him, Ream conveyed the same to one John Miller, who had thereupon conveyed it to the said Kaylor; that Mrs. Haley had, in the

meantime, died. Wherefore Kaylor moved the court to make an order correcting the decree of foreclosure by inserting therein the description of the real estate lastly above set out, and that such correction be then entered as of the date at which the decree was rendered.

Reuben H. Gill, as the administrator of Mrs. Haley, and Charles W. Runnels and the other children of Levi Runnels, herein above named, were made defendants to the motion, but John F. Runnels, the judgment plaintiff, was not in any manner made a party to the motion.

The circuit court, after hearing the evidence offered, which consisted only of the pleadings and proceedings, including the judge's notes on the court-docket, in the original cause, ordered the decree of foreclosure to be amended by inserting therein a description of the mortgaged land corresponding with, and so as to include the land set apart to Mrs. Haley in the partition proceeding, which was accordingly done.

The alleged insufficiency of the motion as a complaint in this proceedings does not present any material question for our consideration. *Hebel* v. *Scott*, 36 Ind. 226; *Blizzard* v. *Blizzard*, 40 Ind. 344; *Latta* v. *Griffith*, 57 Ind. 329; *Urbanski* v. *Manns*, 87 Ind. 585. Nor is a motion for a new trial either contemplated or appropriate in such a proceeding. *Jenkins* v. *Long*, 23 Ind. 460; *Corwin* v. *Thomas*, 83 Ind. 110; *Dukes* v. *Working*, 93 Ind. 501.

In cases like this, as in all other merely summary or auxiliary proceedings, the reservation of an exception upon the sufficiency of the evidence raises the question of its sufficiency in this court without moving for a new trial. *Blizzard* v. *Blizzard*, *supra*; *Beeber* v. *Bevan*, 80 Ind. 31; *Coulter* v. *Coulter*, 81 Ind. 542.

Amendments of the entries of judgments and of decrees, like orders for their entries *nunc pro tunc*, will only be permitted in furtherance of justice, and in some of the States a much more liberal practice is indulged in respect to such amendments than in others.

Freeman on Judgments, at section 72, says: "The doctrine in this country, in reference to amendments of records, may be said to have crystallized into the following legal propositions, namely: That any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgments or proceedings, and is not an error in the expressed judgment pronounced by the court in the exercise of its judicial discretion, is a mere *clerical error*, and amendable, no matter in how important a part of the record it may be; and when the error or defect is in respect to the entry of some judgment, order, decree or proceeding, to which one of the parties in the cause was of right entitled, and, as a matter of course, according to law and established practice of the court, it will sometimes be presumed to have occurred through the misprision of the clerk, and will always be amendable if from other parts of the record, or from other convincing and satisfactory proofs, it can be clearly ascertained what judgment, order or decree the party was entitled to."

As to the nature and sufficiency of evidence necessary to entitle a party to have a judgment or decree amended in this State, see the cases of *Boyd* v. *Blaisdell*, 15 Ind. 73; *Baker* v. *Chambers*, 18 Ind. 222; *Jenkins* v. *Long*, *supra*; *Miller* v. *Royce*, 60 Ind. 189; *Schoonover* v. *Reed*, 65 Ind. 313; *Hughes* v. *Hinds*, 69 Ind. 93; *Reily* v. *Burton*, 71 Ind. 118; *Mitchell* v. *Lincoln*, 78 Ind. 531; *State, ex rel.*, v. *Porter*, 86 Ind. 404; *Williams* v. *Henderson*, 90 Ind. 577.

The final order entered in this proceeding can not be sustained for several reasons: *First.* Because the application was not made by or on behalf of the judgment plaintiff, who was in some way a necessary party to the proceeding. *Cassel* v. *Case*, 14 Ind. 393; *Owen* v. *Cooper*, 46 Ind. 524; *Urbanski* v. *Manns*, *supra*. *Second.* Because such a mistake as that alleged in the motion can not be corrected upon the application of the purchaser under the decree of foreclosure or his assignee. *Rogers* v. *Abbott*, 37 Ind. 138; *Miller* v.

Kolb, 47 Ind. 220; *Lewis* v. *Owen*, 64 Ind. 446; *Angle* v. *Speer*, 66 Ind. 488; *Conyers* v. *Mericles*, 75 Ind. 443; *Keepfer* v. *Force*, 86 Ind. 81. *Third.* Because the evidence was insufficient, in any event, to authorize a correction of the description of the mortgaged land in the decree of foreclosure.

The judge's notes relied upon as affording sufficient evidence that the decree of foreclosure was not entered as directed, read as follows: "Defendants defaulted, except James C. and Hannah Haley; William H. Trammel appointed guardian *ad litem* for infant defendants; answer filed; submitted to court; finding for plaintiff $185, and foreclosure of the mortgage and sale of the premises ordered, as described in complaint."

In construing these notes, which we must do with reference to the complaint and antecedent proceedings in the cause, it must be observed that the complaint failed to allege that the mistake sought to be reformed was the *mutual* mistake of the parties to the mortgage, and that it had not, for that reason, presented a proper case for the reformation of the mortgage. *Baldwin* v. *Kerlin*, 46 Ind. 426; *Schoonover* v. *Dougherty*, 65 Ind. 463; *Wood* v. *Deutchman*, 75 Ind. 148; *Easter* v. *Severin*, 78 Ind. 540; *Craven* v. *Butterfield*, 80 Ind. 503.

There is in fact nothing in the pleadings as we find them in the record, or in any accompanying paper in the cause, showing that the judgment plaintiff was entitled to have a reformation of his mortgage at the time he took his decree of foreclosure. The inference must, therefore, be taken to be that the omission to enter a reformed or corrected description of the land in the decree resulted, as of course, from directions given by the court, and hence not from any misprision of the clerk. *Barnaby* v. *Parker*, 53 Ind. 271.

For the same reason we can not infer that the land referred to in the judge's notes was any other than the land described in the mortgage.

The concluding clause of section 396 of the R. S. of 1881, is in these words: "The court may also, in its discretion, al-

low a party to file his pleadings after the time limited therefor; and shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect, and supply an omission in any proceedings, on complaint or motion filed within two years."

Whether the limitation of two years imposed by this provision applies to merely clerical omissions, like the one charged in this case, is a question which counsel have not argued, and which, for that reason, we have not considered. As bearing upon that question, however, see the case of *Temple* v. *Irvin*, 34 Ind. 412.

The judgment amending the description of the mortgaged land is reversed, with costs, and the cause remanded for further proceedings.

Filed May 27, 1884.

No. 11,324.

EDWARDS *v.* DYKEMAN ET AL.

PARTITION.—*Proceeding In Rem.—Parties.—Notice.*—An action for the partition of real estate is a proceeding *in rem*, and all persons having an interest in the property, either as owner or lien-holder, at the commencement of the suit, are proper parties to such proceeding, and all persons dealing with the property, *pendente lite*, are affected with notice of the orders and proceedings had therein and are bound thereby.

SAME.—*Receiver.—Sale of Property.—Delivery of Possession to Purchaser.—Attachment or Writ of Possession.*—Pending a suit for partition, the court may, upon a proper showing, appoint a receiver to take possession and care of the property, collect rents, etc.; and where the proceedings result in the sale of the property, the court may order the delivery of possession to the purchaser, and may enforce such order by an attachment against the person, upon a rule to show cause and an insufficient showing, or by writ of possession.

PLEADING.—*Motion.—Demurrer.—Assignment of Error.—Supreme Court.*—A motion for the issue of a writ is not a complaint, nor is it the subject of a demurrer; and after a hearing had and a decision made in favor of the moving party, the sufficiency of such a motion can not be called in question, for the first time, by an assignment of error in the Supreme Court.

From the Cass Circuit Court.

D. C. Justice, M. Winfield and *D. Turpie,* for appellant.
S. T. McConnell and *D. P. Baldwin,* for appellees.

HOWK, J.—On the 23d day of August, 1873, Martha Plant and others, claiming to be heirs at law of one Martha Bliss, who died in 1871, commenced an action in the Cass Circuit Court against the other heirs at law of such decedent, and against certain other named persons as the heirs at law of one Allen Hamilton, deceased, and against certain other named persons as the heirs at law of one Cyrus Taber, deceased. In the plaintiffs' complaint in such action, it was alleged that, on March 1st, 1854, Cyrus Taber and Allen Hamilton executed to the said Martha Bliss their certain title-bond, wherein it was recited that they had on that day sold unto the said Martha Bliss lot No. 20, in the recorded plat of the town of Taberville, in Cass county, for the sum of $500, the receipt of which was thereby acknowledged; and the bond was conditioned to be void if the said Taber and Hamilton should, on or before March 1st, 1856, execute to the said Martha Bliss a sufficient warranty deed of said lot. It was alleged, *inter alia,* that the said Martha Bliss, in her lifetime, fully paid the said Cyrus Taber and Allen Hamilton, during their lives, the $500 of purchase-money mentioned in such bond; but that they had not while living, nor, since their deaths, had their respective heirs at law, executed a conveyance of the lot above described either to the said Martha Bliss, during her life, or, since her death, to her said heirs at law, to whom the said lot, it was averred, had descended in certain specified shares. The prayer of the plaintiffs' complaint, in such action, as against the heirs at law respectively of the said Allen Hamilton and Cyrus Taber, was for a decree and order appointing a commissioner for the conveyance of said lot to the said heirs at law of said Martha Bliss, deceased; and, as among themselves, the said heirs of Martha Bliss, deceased, prayed for the partition of said lot according to their respective interests therein.

It is only with the partition branch of the above described action this appeal has any connection, and, therefore, the proceedings in the other branch of such action will not be further noticed in this opinion. In the partition branch of such action, there were filed from time to time demurrers, answers, replies and cross complaints, and there were changes of venue, and changes of judges, during the progress of the cause; but the most of these proceedings need not be specially noticed, as they do not seem to us to have any connection with the questions presented for our decision by the appellant's assignment of errors. In passing through the record we notice, however, that, on the 29th day of January, 1875, the court made an order appointing one Dennis H. Palmer, pending the litigation, a receiver to take charge of the property in controversy, make the necessary repairs, pay taxes, rent it and collect the rents, and keep it insured, etc.; but the record fails to show that Palmer ever qualified as such receiver. Afterwards, on the 21st day of December, 1877, upon a motion then pending for the appointment of a receiver, the court made an order that the defendant James M. Mason, who was the owner by inheritance, as alleged by the plaintiffs, of only the undivided one thirty-sixth part of the property in controversy, filed a bond, payable to the State, in the sum of $300, for the use of the plaintiffs in such action entitled thereto, "to receive the payment of the rents hereafter to accrue of the property in dispute," which bond was filed accordingly and approved by the court.

Afterwards, on January 30th, 1880, before the Hon. Edwin P. Hammond, as special judge, the issues joined in the partition branch of the aforesaid action were submitted to the court for trial, and the court found that Martha Plant was the owner in fee of an undivided one-third part, that Joseph E. and Henry Brown were jointly the owners in fee of an undivided one-third part, and that the defendant James M. Mason was the owner in fee of the remaining undivided one-third part, of the property in controversy; that the said parties

were entitled to have their respective shares of said property set off to them in severalty; and that partition of such property could not be made between the said parties, according to their said respective interest therein, without damage to them as the owners thereof. Thereupon the court appointed Dyer B. McConnell a commissioner to sell the property in controversy, upon the terms and conditions specified in its order of sale.

Afterwards, at the September term, 1881, of the court below, the commissioner, McConnell, reported to the court that in pursuance of the order of the court, on the 16th day of July, 1881, at the door of the court-house, in Logansport, he had offered and sold at public outcry the property in controversy for the sum of $870 to David D. Dykeman, he being the highest and best bidder therefor, and his said bid being more than two-thirds of the appraised value thereof; and that the said Dykeman had fully complied with the terms of such sale, as prescribed in the order of the court. Thereupon such sale was in all things confirmed by the court; and it was ordered, adjudged and decreed by the court, "that said Dykeman, as such purchaser, is entitled to the immediate and exclusive possession of said premises sold to him, and the parties to this suit are hereby ordered to surrender to said Dykeman such possession of lot No. 20, in the town of Taberville, in Cass county, Indiana, with all the privileges and appurtenances belonging thereto, this order to be enforced only by attachment for contempt, upon its being shown to the court, by affidavit or other satisfactory proof, that the parties herein refuse to comply with the same."

The proceedings had upon and subsequent to this last order of the court are the matters complained of, as errors, by the appellant, William Edwards, in his appeal. Neither he nor the appellee Dykeman was a party to the litigation about the property in controversy, prior to the making of such order. Afterwards, however, on the 8th day of November, 1881, the appellee Dykeman, upon his affidavit then filed, obtained an order of the court requiring the defendant

James M. Mason to show cause why he should not be attached for contempt, for his alleged disobedience of such order of the court, in refusing to surrender the possession of such property to Dykeman, the purchaser thereof. The defendant Mason appeared and moved the court, upon the affidavits then filed of himself and the appellant, Edwards, to be discharged from such order or rule against him; which motion was overruled by the court, and to this ruling Mason excepted. Thereupon Mason prayed an appeal and offered to file bond with surety, in such sum as the court might fix; which appeal was not allowed by the court, and to this action of the court Mason excepted. The court then ordered that an attachment for contempt be issued against the defendant Mason, returnable forthwith.

The record fails to show that this attachment was ever issued or served; and, for two years, no further steps seem to have been taken in the partition branch of the action, probably because of the difficulty in obtaining a special judge to sit in the cause. On the 7th day of November, 1883, Martha Plant, one of the plaintiffs in the action, and the appellee Dykeman, jointly moved the court, the Hon. John H. Gould being special judge, for a writ putting the said Dykeman, as purchaser of the property in controversy, in possession thereof; and thereupon it was ordered by the court that the appellant, Edwards, and the defendant Mason "be notified to show cause why they should not give possession of said property to plaintiff." The appellant, Edwards, appearing specially, moved the court in writing to set aside the said order or rule as against him; which motion was overruled by the court, and to this ruling he excepted. Sundry affidavits were then filed by and on behalf of the appellant, Edwards, in attempted discharge of the order and rule against him. But, upon the hearing had, on November 22d, 1883, the court found that the appellant, Edwards, in defiance of the orders and decree of the court theretofore made, was in possession

of the real estate in controversy, described in said orders; and therefore the court sustained the motions of plaintiffs and Dyer B. McConnell, commissioner, for a writ to put the purchaser, David D. Dykeman, in possession of such property, to which ruling the said Edwards excepted. Thereupon it was ordered and decreed by the court, that a writ of possession issue, *instanter*, to the sheriff of the county, for the purpose of putting the appellee Dykeman in possession of the property; but that this order should not prejudice the rights of appellant, Edwards, under his tax deed or his lien, if he had a lien, for taxes paid on such property. The motion of appellant, Edwards, to set aside this order, was overruled by the court, and he excepted and prayed an appeal and tendered an appeal bond; but the court rejected such appeal bond, upon the ground that no appeal would lie from its order to the Supreme Court, and because such bond would not stay proceedings under such order.

In this court, the appellant, Edwards, has assigned errors upon the record, which present, or are intended to present, the several rulings of the circuit court of which he complains. Upon the filing of the record and his assignment of errors thereon, the appellant obtained from this court a special supersedeas; and, upon his petition filed, he also procured here an order restraining the appellees from taking any further steps against him below, until his appeal could be heard and determined. The appellee Dykeman has moved this court to set aside such supersedeas and dissolve such restraining order; but, in the view we take of the case, it is unnecessary for us to consider or decide these motions. We pass, therefore, to the consideration of the errors complained of by the appellant.

It is first insisted by the appellant's counsel, that the court erred in overruling his motion to set aside the order or rule of the court, requiring him to show cause why a writ of possession should not issue putting the appellee Dykeman in

possession of the property in controversy, purchased by him under a previous order of the court. After referring to the affidavits of Dykeman, Mason and Edwards, as parts of the record, the appellant's counsel say: "There is sufficient in these affidavits to show two things, that Edwards was in possession, and that he claimed to own and hold the property by virtue of a sale for taxes, and a deed executed to him in pursuance of such sale, in February, 1877. This was the claim of Edwards. The claim of Dykeman, as shown in his affidavit, is founded upon the fact that he was a purchaser at commissioner's sale of the premises, in a partition proceeding. He held only a certificate of purchase; he had received no conveyance; a deed to him had not been executed; such deed might have drawn after it the possession or right of possession, but the deed he had not; his right of possession rested wholly upon 'the order of the court.'" After thus vigorously stating their views of the respective claims of Edwards and Dykeman to the property in controversy, counsel thus propound the question, which, they say, is at the very threshold of the case: "Can such claims as these be heard and determined by a rule and upon affidavits?"

We are of opinion, however, that there is another question which underlies the question propounded by counsel, and that is this: Is the order of the court, upon which, counsel claim, Dykeman's right to the possession of the property wholly rests, a valid exercise of judicial power and authority? This we regard as the fundamental question in the case, and the one which meets us *in limine*, in considering and determining which of the two parties, Edwards or Dykeman, has the better right to the possession of the property; for, if this question must be answered in the affirmative, then it is certain that Edwards' claim to the property, acquired *pendente lite*, as it confessedly was, could not obstruct the court's enforcement of its order.

It will be seen from our statement of the case, in which

this order of the court was made, that it had been pending for years before Edwards claimed to have acquired any title to, or interest in, the property in controversy, and, so far as the record shows, it is still pending. It was a suit for the partition of the property between the owners thereof. Such a suit is a proceeding *in rem*. *Applegate* v. *Edwards*, 45 Ind. 329; *Clark* v. *Stephenson*, 73 Ind. 489; *Crans* v. *Board, etc.*, 87 Ind. 162. In such a suit all persons having an interest in the property either as owner or lien-holder, at the commencement of the suit, are proper parties thereto, and all persons dealing with the property, *pendente lite*, are affected with notice of the orders and proceedings had therein, and are bound thereby. *Milligan* v. *Poole*, 35 Ind. 64.

Appellant's learned counsel, with much force and earnestness, attack the validity of "the order of the court," now under consideration. They say: "We believe this order is an utter nullity; that the court, in making it, grossly transcended its powers; that it is binding upon no-one. We question whether such an order was ever made in any partition suit or in any civil action before. It is certainly an order without precedent. Upon what authority was it made? Not by virtue of the statute. * * * * The statute is altogether silent on the subject of possession. There is no provision in it about possession, and especially there is none about the possession of the premises being surrendered to the purchaser before he gets a deed therefor. And we have the same objection to make to the latter part of this novelty in the line of judicial orders, which is that the order for the surrender of possession '*be enforced only by attachment.*' We do not think that there is any statutory or other authority for this manner of enforcing an order for the possession of real property against any one."

We have given the appellant's counsel the benefit of a liberal quotation from their argument against the validity of "the order of the court," requiring the parties to the suit to surrender to Dykeman, as the purchaser of the property, the

immediate and exclusive possession thereof, and providing for the enforcement of such order "only by attachment for contempt," upon satisfactory proof of the refusal of the parties to comply therewith. If counsel are right in their position, that the order of the court is "an utter nullity," and that the purchaser of real property, under a decree of sale in a suit for partition, is left by the law, and must be left by the courts, "to obtain his possession by the ordinary remedies," if he can, against the parties, privies or strangers to the record, then, of course, the entire proceedings of the court, as between Dykeman and Edwards, are erroneous, and ought to be and must be reversed.

We have heretofore quoted at length, in our statement of this case as shown by the record, "the order of the court," of which the appellant's counsel complain in such strong terms, in their brief of this cause. This order of the court appears to have been made and entered in the order book, on the 28th day of October, 1881. At that time, the suit had been pending for more than seven years. The suit was not only a suit *in rem*, but, as early as January 29th, 1875, the court had assumed the possession and control of the property, and made an order for the appointment of a receiver to take charge of the property, and prescribing his duties in the premises. For some reason not shown by the record, the receiver then appointed failed to qualify. Afterwards, on December 21st, 1877, upon an application then pending for the appointment of a receiver, under an order of the court then made, the defendant James M. Mason made and filed a bond to the approval of the court, for the use of the plaintiffs entitled thereto, to receive payment of the rents, thereafter to accrue, of the property in dispute. This order, and Mason's bond, are shown by the record to have continued in force until the making and entry of "the order of the court," providing for the surrender by the parties to the suit, of whom Mason was one, of the possession of the property to Dykeman, as the purchaser thereof. It is true, that in the order for the sale of

the property made on January 30th, 1880, provision was made for the release of Mason's bond upon his doing certain things, which the commissioner was to see that he did and adjust; but the record shows nothing further on the subject.

It is fairly shown by the record, we think, that the court had possession and control of the property in controversy, at the time of the sale thereof to Dykeman, and at the time of the confirmation of such sale by the court, and of the entry of its order requiring the surrender of the immediate and exclusive possession of the property to Dykeman, as its purchaser, and providing for the enforcement of such order by an attachment for contempt. This being so, we are clearly of the opinion that such order of the court was, under the facts and circumstances of this case as shown by the record, a proper, lawful and valid exercise of the judicial power and authority of the court. The order is not a nullity; the court did not, in making such order, transcend its powers in any manner, or to any extent; and the order was and is binding upon the parties to the suit, and upon the appellant, Edwards, who was shown to have obtained his possession and alleged right of possession of the property, *pendente lite*, and after the court's appointment of a receiver, through the fraudulent connivance and assistance of one of the parties to the suit. The court had the power, independently of any statute, to enforce its lawful order, either by an attachment for contempt, or, in its discretion, by the proper process of the court. Thus, in *Little* v. *State*, 90 Ind. 338, in speaking for this court, ELLIOTT, J., said: "Courts of justice possess powers which were not given by legislation, and which no legislation can take from them. Judicial power exists only in the courts; it can not live elsewhere. * * * The judiciary is a co-ordinate department of the government, and is not a mere subordinate branch, dependent for existence and power upon the legislative will. Purely judicial powers * * * are not the creatures of legislation, and these powers are inalienable and indestructible."

In the case at bar, the question for decision is not whether the respective claims of Edwards and Dykeman can or can not "be heard and determined by a rule and upon affidavits," but the real question is whether the court may or may not enforce its lawful order in relation to the possession of the property, by a rule and affidavits against Edwards, upon his making an insufficient showing in response to such rule. Upon this latter question we have no doubt; the court did not err in overruling Edwards' motion to set aside the order or rule requiring him to show cause why a writ of possession should not issue, putting Dykeman in possession of the property purchased by him, under the order of the court. In the order of the court, awarding the writ of possession, it was expressly provided, as we have seen, that such order should not prejudice the rights of appellant, Edwards, under his tax deed or his lien, if he had a lien, for taxes paid on such property. Considering the time and manner at and in which Edwards acquired his tax deed and his alleged right of possession, and his lien, if he had a lien, for taxes paid on the property, it seems to us that this provision in such order, that his rights should not be prejudiced thereby, was as much as he had any right to ask for, or could reasonably expect the court to grant him, in the way of relief or protection.

The conclusion we have reached, and the views we have expressed, upon and in regard to the first error of which appellant complains, practically disposes of all the questions in this case presented for our decision, adversely to him. It is claimed, on behalf of appellant, Edwards, that the court erred in refusing to discharge its order or rule, requiring him to show cause why the writ of possession should not be issued, and in awarding the issue of such writ, and in overruling his motion to set aside its order, finding and judgment awarding a writ of possession, and in overruling his motion for a new trial. All these specifications of error present for decision the single question of the sufficiency of the showing made by Edwards for the purpose of discharging the order or rule

against him and thus preventing the issue of the writ of possession, upon the application of Dykeman. The court found Edwards' showing to be insufficient, and that his possession of the property was in defiance of its previous orders and decree, and awarded the writ. We can not disturb the finding of the trial court in the condition of the record. The bill of exceptions, appearing in the record, affirmatively shows upon its face, that it does not contain all the evidence produced before the court upon the hearing of Dykeman's motion. In such case, as we have often decided, the finding and decision of the lower court will not be disturbed here upon the weight or sufficiency of the evidence produced at the hearing or trial. *Railsback* v. *Greve*, 58 Ind. 72; *Millikan* v. *State, ex rel.*, 70 Ind. 310; *Morris* v. *Stern*, 80 Ind. 227.

The only remaining errors assigned by the appellant relate to the motions of Martha Plant, Dykeman and commissioner McConnell, for the issue of the writ of possession. In several specifications it is assigned as error that these motions do not, nor does either of them, state facts sufficient to constitute causes of action. Such motions can not be regarded, however, as, in any proper sense, the complaints of the moving parties. They are not the subjects of demurrer, and, surely, assignments here of the insufficiency of their facts, as errors, present no questions for our decision. They are not even parts of the record, on an appeal to this court, unless they are made such by bill of exceptions or by an order of court. Section 650, R. S. 1881. In no event, as it seems to us, can the sufficiency of such motions, after hearing had and decision rendered in favor of the moving party, be called in question for the first time in this court.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment. Nothing whatever is decided here, either directly or by implication, touching Edwards' right of appeal from any of the rulings or orders below, of which he complains as errors; but, waiving this question, we have considered and decided the

case as it is presented by his assignment of errors endorsed on the record. The judgment is affirmed, with costs.

HAMMOND, J., did not participate in the decision of this cause.

Filed May 27, 1884.

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95 521
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No. 7894.

REEVES, GUARDIAN, *v.* HAYES ET AL.

MORTGAGE.—*Assignment.*—*Recording.*—*Notice.*—Prior to July 2d, 1877, R. S. 1881, section 1093, there was no law authorizing the record of the assignment of a mortgage, and such record, if made, would not have been notice to subsequent purchasers or mortgagees in good faith. NIBLACK and ZOLLARS, JJ., dissenting.

SAME.—*Release.*—*Priorities.*—After assigning the debt secured thereby, a mortgagee has no power to enter satisfaction of a mortgage, and such entry of satisfaction by him on the margin of the record in the manner provided by statute, R. S. 1881, section 1090, will not give priority to a subsequent mortgagee in good faith without actual notice of the assignment of the debt. *Ayers* v. *Hays*, 60 Ind. 452, overruled. NIBLACK and ZOLLARS, JJ., dissenting.

From the Rush Circuit Court.

G. C. Clark, J. W. Brown, G. B. Sleeth, J. W. Study and *W. A. Cullen*, for appellant.

L. Sexton, C. Cambern, J. H. Mellett, E. H. Bundy and *J. M. Morris*, for appellees.

ELLIOTT, C. J.—John S. Hayes executed to William F. Reeves, guardian, a mortgage to secure the payment of three promissory notes evidencing the unpaid purchase-money of land sold to him by the guardian, and dated September 1st, 1873; afterwards Hayes sold the land to Len M. Copeland, who executed nine promissory notes for the purchase-money and also executed a mortgage; three of these notes were paid; prior to November 6th, 1874, one of them, number four in order of priority, was assigned to the First National Bank of Newcastle; on the day named Hayes assigned to Reeves, guardian, the notes, in order of priority numbers six

and eight, in exchange for the first notes executed by the former to the latter, and delivered, at the time, the mortgage executed by Copeland; on the 7th day of June, 1875, seven months after Reeves, guardian, had acquired the notes and mortgage by assignment, his assignor and original debtor, executed a release to Copeland which was placed on record; after the execution of this release and its entry of record, William Wilson lent to Copeland $2,000, and took as security a mortgage on the land bought of Reeves, guardian. The contest is as to who has the prior lien Wilson or Reeves and the Bank of Newcastle, the court below holding that Wilson's lien was superior to that of the appellants.

Prior to July, 1877, there was no law in force in the State authorizing assignments of mortgages to be recorded. This was the ruling in *Hasselman* v. *McKernan*, 50 Ind. 441, and while some of those who concur in this opinion regret that decision, we feel bound by it, for the reason that it has never been disapproved, but, on the contrary, has been repeatedly approved and followed. *Coombs* v. *Carr*, 55 Ind. 303; *Dixon* v. *Hunter*, 57 Ind. 278; *Cain* v. *Hanna*, 63 Ind. 408; *Hosford* v. *Johnson*, 74 Ind. 479. There is, therefore, an unruffled current of decisions upon this subject, but there is more, the Legislature accepted the court's construction of the statute and passed an act providing for the recording of assignments, so that we have the concurrent action of two of the great departments of government. R. S. 1881, section 1093.

It is perfectly well settled that notice is never imparted by the recording of an instrument which the law does not authorize. In *Deming* v. *State, ex rel.*, 23 Ind. 416, it was held that a mortgage, not acknowledged according to law, could not be legally recorded, and that, although actually entered of record, it did not constitute notice, the court, by FRAZER, J., saying: "We suppose there can be no question, that the fact that the mortgage was actually recorded, without being acknowledged or approved, as the statute required to entitle

it to be recorded, is not notice." If it be true, as undeniably it is, that such a registration is not notice, much stronger the reason for holding the record not notice where there is no law authorizing the recording of the instrument. That is the case here, for there is not merely a defective execution of an instrument, but an absolute absence of authority for recording it. *Caldwell* v. *Williams*, 1 Ind. 405; *Brown* v. *Budd*, 2 Ind. 442; *Taylor* v. *City of Ft. Wayne*, 47 Ind. 274; *Westerman* v. *Foster*, 57 Ind. 408. Judge Story says, in speaking of the registry of instruments: "If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity." 1 Story Eq., section 404.

The appellants could not have done more than they did do. The recorder could not have recorded the assignment without a violation of his duty, and even if he had actually recorded it, his action would have been a mere nullity. There can be neither fault nor negligence where one does all the law permits him to do. *Purdy* v. *Huntington*, 42 N. Y. 334 (1 Am. R. 532). See opinion, SUTHERLAND, J., 1 Am. R. 541. It was impossible for the appellants to have given notice, for there was no way in which it could be done. They acquired rights in good faith, have been guilty of no fault, they are equal in equity, and prior in point of time, and we know of no principle which will warrant the courts in depriving them of their rights.

The contesting parties in this case are equal in equity, for both parted with value, and the appellants, as we have seen, were not, in anywise, in fault; therefore the maxim, "Where there are equal equities, the first in order of time shall prevail," must be the governing rule. 1 Pom. Eq., section 413.

The authority of the mortgagee to release the mortgage terminated with the assignment. A recent writer thus states the rule: "After an assignment of the mortgage note the mortgagee can not discharge the mortgage if the note be negotiable and it be assigned to an innocent party, before due

and for a good consideration, although the note be without any consideration; and satisfaction so entered will be vacated by a court of equity." At another place this author says: "The notes in such a case become the evidence of the mortgagee's authority to enter satisfaction of the lien." 1 Jones Mort., section 814. In *McCormick* v. *Digby*, 8 Blackf. 99, it was held that the mortgagee had no authority to enter satisfaction after assignment, and this decision has received uniform approval from the text-writers. 4 Kent Com. 194; 1 Hilliard Mort. 230; 2 Washb. R. P. 129; Thomas Mort. 418; 1 Jones Mort., section 814.

The release entered by the mortgagee after assignment of the notes was ineffective, and the only ground on which the assignees can be even plausibly said to have lost their rights is that of negligence. But it is legally impossible to conceive them guilty of negligence, for they had done nothing wrong, and had omitted nothing that they could do. If there had been a law authorizing the recording of assignments, then a very different question would face us.

Promissory notes are articles of commerce, and pass from hand to hand by barter and sale. The transfer of a note carries the mortgage, for the former is the principal and the latter the incident. This is in accordance with the universal rule that the grant of the principal thing carries all the incidents. *Matthews* v. *Wallwyn*, 4 Vesey, 118; *Jackson* v. *Blodget*, 5 Cowen, 202; *Green* v. *Hart*, 1 Johns. 580; *Johnson* v. *Hart*, 3 Johns. Cas. 322. In *Hubbard* v. *Harrison*, 38 Ind. 323, it was said: "The assignment of a mortgage, independent of the debt which it is given to secure, is an unmeaning ceremony." It has always been the law of this State that the assignment of the note carries the mortgage. *Blair* v. *Bass*, 4 Blackf. 539. In *Hough* v. *Osborne*, 7 Ind. 140, the court said: "The only thing easily perceivable as to the transfer of the mortgage security without the notes, was its futility." *Garrett* v. *Puckett*, 15 Ind. 485; *Gower* v. *Howe*, 20 Ind. 396.

The assignment of a note negotiable by the law merchant carries the mortgage security, and in the hands of a *bona fide* holder the security is protected to the same extent as the note itself. *Gabbert* v. *Schwartz*, 69 Ind. 450; *Bayless* v. *Glenn*, 72 Ind. 5; *Carpenter* v. *Longan*, 16 Wall. 271; 1 Dan. Neg. Inst. 834; Clemens Corp., sec. 158.

Promissory notes may be transferred by delivery. *Hancock* v. *Ritchie*, 11 Ind. 48; *Speelman* v. *Culbertson*, 15 Ind. 441; 1 Dan. Neg. Inst., section 729. So may a mortgage. 3 Pomeroy Eq. Jur., section 1210; 1 Jones Mort. 813. But here there was a written assignment of the notes and a delivery of the mortgage. The appellants by the assignment to them of the notes acquired title, and as they acquired the notes they also acquired the mortgage securing them. It would not have added to the strength of their title to have taken a written assignment of the mortgage, because, under the law as it stood at the time, no assignment could have been admitted to record. The fact that no written assignment was taken does not impair their rights or show them to be in fault, for the reason that had they taken one it would not have enabled them to give constructive notice by registry.

Cases decided in States where the law provides for the registry of assignments can not be in point in a State where there is no law authorizing them to be recorded. This is the essential difference between many of the cases cited in argument and the one at bar. We must turn to the common law for information, because, as there is no statute authorizing assignments to be recorded, we must look to the rights of the parties as they existed in the absence of such statutes. The case of *James* v. *Morey*, 2 Cowen, 246, was very ably argued, and the subject very carefully considered. Opinions were read by the Chief Justice and several other members of the court, and it was held that the assignee took absolute title as against subsequent mortgagees and *bona fide* purchasers, for the reason that there was no law authorizing the assignment of a mortgage to be recorded. WOODWORTH, J., in the course of

his opinion, said: "I have not met with any case that places the rights of the assignee on other or different ground, or that gives countenance to the suggestion, that the assignee must, at his peril, give notice to a subsequent assignee, or purchaser from the mortgagee. Such a doctrine is not only most unreasonable in itself, but would shake the foundation of security by mortgage assignment, hitherto deemed equal to that of the original mortgage, with the exceptions I have stated. It would, in fact, be no security, beyond the responsibility of the person making the assignment; for the assignee has no means of ascertaining how often, and to whom, the mortgagee may have subsequently assigned. Such notice is not necessary for the protection of a subsequent purchaser. The registry of the original mortgage is notice to him of its existence. If he will deal without asking for the mortgage or requiring it to be cancelled, he comes, without a semblance of equity, to demand that the prior *bona fide* assignee shall be postponed to his claim." Again, the judge says: "But is this pretended hardship anything more than every purchaser of land was liable to, since the existence of this government, until the last act requiring deeds to be recorded? Every grantor had the power of conveying a second time, and no doubt the power was sometimes exercised by fraudulent individuals. It was never seriously urged that the second purchaser had any remedy against the first purchaser, because his deed was not recorded or notice given." SUTHERLAND, J., said: "If I have been successful in showing that the assignee is not bound to record the assignment, and that a voluntary registry would not be constructive notice to any person, then it necessarily follows, that whatever notice is required to be given must be actual and not constructive; for I know of no other act which can be supposed the assignee was bound to perform, from which notice could be inferred, except the act of registering. Now it is utterly impossible for the assignee of a mortgage to know with whom the mortgagee may subsequently deal in relation to the mortgaged

premises." Chief Justice SAVAGE said: "I know of no law requiring the assignment of a mortgage to be recorded. If notice of the assignment is not given to the mortgagor, he is protected in any payments he may make to the mortgagee. And this is the extent of the risk run by the assignee, who neglects to give notice of the assignment."

A second mortgagee who finds on record a mortgage receives notice of its existence, and he must ascertain whether the release was executed by one having authority, for he is bound to know, as matter of law, that notes secured by mortgage are transferable as articles of commerce, and that, after transfer the mortgagee has no right to release the mortgage. He is bound, also, to know that he can obtain no notice from the record, because the law does not authorize the recording of assignments, and that he must, therefore, look elsewhere for information.

Where notice can not be given by registry, then one who takes an interest in mortgaged property must ascertain that the person assuming to release the mortgage is the holder of the notes which it secures. It is unquestionably the law that where notice of title can not be given by record, the person seeking to secure rights must ascertain who is the owner of the mortgage, by tracing the notes to the hands of the assignees. It is said by Jones that "Purchasers are bound to know that if the mortgagee has endorsed the notes before maturity to a *bona fide* holder, the mortgagee has no longer authority to satisfy the mortgage; and therefore they are bound to ascertain whether the mortgagee still held the notes at the time he discharged the mortgage." 1 Jones Mort., section 814. In *Wolcott* v. *Winchester*, 15 Gray, 461, it was said: "As a purchaser, he must have known that the possession of the debt was essential to an effective mortgage, and that without it he could not maintain an action to foreclose the mortgage. The not finding it in the possession of the mortgagee, and not stipulating for any transfer of such debt, are circumstances that should estop him from setting up any title against

a *bona fide* purchaser of the debt, who had possession of the bond and an assignment of the mortgage in due form to vest the legal estate in him as against the assignor, and only defective as to any others, in not being recorded." The case of *Kellogg* v. *Smith*, 26 N. Y. 18, holds that the purchaser of a bond and mortgage, who fails to require the production of the bond, is chargeable with notice of defects in his assignor's title. A much stronger case than those cited, or the one at bar, is that of *Burhans* v. *Hutcheson*, 25 Kan. 625, S. C. 37 Am. R. 274, where it was held that one who paid a commercial note secured by mortgage, without ascertaining that the note had not been transferred, did so at his peril, even though the statute authorized the recording of assignments of mortgages.

It must be held that the purchaser of a note secured by mortgage, who can not give record notice of his rights, is entitled to protection as against subsequent encumbrances, or we must deny the negotiable value of such instruments. It is well said by Mr. Daniel, in maintaining the soundness of the rule we have stated, that "The security of the mortgage may impart to the paper its marketable value, as in the case of corporation coupon bonds, which rests mainly upon the basis of such security for their payment. And to sever the basis of credit from the obligation to pay would most frequently defeat the negotiation of these, or similar instruments, at anything like their par value." Dan. Neg. Inst., sec. 834.

It is impossible for one who acquired title to a mortgage by assignment prior to the act of 1877, to give notice of his title to all who might afterwards become interested in the mortgaged premises; all that he could do would be to take an assignment of the note and mortgage. On the other hand, it is both possible and practicable for one about to take a second mortgage, to ascertain whether the original mortgagee had authority to execute a release. No principle of law or equity will justify a holding that one who has omitted inquiry, where a duly recorded mortgage suggests inquiry and

proclaims that action without inquiry is hazardous, shall be preferred to one who has acquired rights in good faith and has omitted nothing which the law permitted or required at his hands. *Campbell* v. *Vedder*, 3 Keyes (N. Y.) 174.

The case of *Trustees, etc.*, v. *Wheeler*, 61 N. Y. 88, is not in point, because the person in whose favor the mortgage was released had acquired an interest in the land prior to the assignment of the non-negotiable bond secured by the mortgage. The case of *Bank of the State* v. *Anderson*, 14 Iowa, 544, is confessedly against the weight of authority, and is the decision of a divided court, followed in the subsequent case of *McClure* v. *Burris*, 16 Iowa, 591, with evident reluctance, and yielded to upon the ground of *stare decisis*. More than this, the recent case of *Bowling* v. *Cook*, 39 Iowa, 200, clearly shows that it is sustainable on the ground that the law authorized the recording of the assignment. In proof of this we quote the following: "The subsequent mortgagee would not be affected by an assignment of a prior mortgage unless charged with actual notice or the assignment has been duly recorded. Following this doctrine, we hold that if the party executing the second mortgage appear from the record to be the one to whom the first was executed and its assignment is not shown by the record, the equities of the second mortgage are superior to the first." It is apparent, therefore, that the doctrine of the Iowa courts does not apply to a case where there is no law authorizing the recording of the assignment. *Summers* v. *Kilgus*, 14 Bush, 449, goes off on two points, one that the mortgage was executed to secure an antecedent debt, the other that the statute of Kentucky authorizes the recording of assignments of mortgages.

Of the case of *Fox* v. *Wray*, 56 Ind. 423, it is only necessary to say that the point here in judgment was there neither discussed nor decided. *Ayers* v. *Hays*, 60 Ind. 452, does decide this question and against the views here declared, but it is evident that in that case the court proceeded on the

theory that assignments were entitled to record. We quote from the opinion the following: "In the case at bar, there was nothing on record, when Hays and Butcher purchased the mortgaged property, indicating that Campbell had parted with the note in suit, or that it remained unpaid, or that Campbell was not fully authorized to enter satisfaction of the mortgage, or had made any mistake in such entry of satisfaction." The whole force of the reasoning in that case is parried when it is considered that as there was no statute authorizing the recording of such instruments, the registry would have been an idle and unmeaning act. There are cases in our reports fully and directly sustaining the doctrine we now lay down. Directly in point is the case of *Dixon* v. *Hunter*, 57 Ind. 278, where the precise question was decided, and was the one on which the case turned. The language used in that case was very strong, the court saying that the proposition was too clear for argument. The third point decided in *Lapping* v. *Duffy*, 47 Ind. 51, is thus discussed: "It is also said, that it was claimed by the incumbrancers whose liens accrued after the entry of satisfaction of the mortgage was made by McClung, that they ought to be protected as purchasers for value, and without notice. We do not think so. According to the allegations of the complaint, McClung, at the time he entered satisfaction of the mortgage, had no interest whatever in the debt, and made the entry without lawful right or authority. It is impossible that his act could, under these circumstances, be binding or obligatory on Lapping and Kerr, or could in any way affect their rights." The case cited again came before this court, and although the former decision was expressly referred to, no question was made as to its soundness. The opinion delivered on the second appeal does, indeed, declare a principle which has an important bearing on the present case, for it declares that the recording of an instrument not required by law to be recorded is not notice. *Lapping* v. *Duffy*, 65 Ind. 229. The case of *Lapping* v. *Duffy*, 47 Ind. 51, has been cited with approval in other cases than *Dixon*

v. *Hunter*, *supra*, among them, *Marshall* v. *Stewart*, 65 Ind. 243, *Teal* v. *Hinchman*, 69 Ind. 379, *Evansville, etc., Co.* v. *State, ex rel.*, 73 Ind. 219 (38 Am. R. 129), *Hunt* v. *Elliott*, 80 Ind. 245 (41 Am. R. 794); and *Dixon* v. *Hunter*, *supra*, is also cited in the first of these cases. On the other hand *Ayers* v. *Hays*, *supra*, does not, so far as we can ascertain, appear to have been even cited in any subsequent case. *Burton* v. *Reagan*, 75 Ind. 77, did not involve the question, for in that case the answer averred that the appellants had notice of the rights of Hadley before the notes were assigned to them, and the question could not have possibly arisen. The case of *Etzler* v. *Evans*, 61 Ind. 56, is in harmony with *Dixon* v. *Hunter*, *supra*, rather than with *Ayers* v. *Hays*, *supra*. It was said in that case by NIBLACK, J., speaking for the court: "Did the statement in writing, which the defendant John F. McClellan attached to the mortgage record, alleging that the consideration upon which the entry of satisfaction of the mortgage had been made had failed, operate as constructive notice of the matters contained in such statement? We are of the opinion that it did not. It was not an instrument which the law authorized to be recorded," and "no one is bound to take notice of the record of it." It seems to us that if a statement attached to the entry of satisfaction, actually although not rightfully on the record itself, can not be regarded as impairing rights or putting persons in default, certainly no one can be in default for not recording what, in legal contemplation, it was utterly impossible for him to record. We feel that it is our duty to follow *Lapping* v. *Duffy*, *supra*, and *Dixon* v. *Hunter*, *supra*, because they are in harmony with our own decisions, and because they are supported by sound principle.

It will be observed that the case of *Hasselman* v. *McKernan*, *supra*, has never been questioned, and that there is an unbroken line succeeding it, while, as between *Ayers* v. *Hays*, *supra*, and *Dixon* v. *Hunter*, *supra*, there is irreconcilable conflict, and we must choose one or the other

of them. There is no other alternative. If we overrule *Hasselman* v. *McKernan, supra,* we carry down many cases and overturn the construction of a statute acted upon by the Legislature; while if we follow *Lapping* v. *Duffy, supra,* and *Dixon* v. *Hunter, supra,* and reject *Ayers* v. *Hays, supra,* we simply elect between two contradictory lines of decisions, and we think it far better to make choice of one of the two conflicting lines than to introduce more doubt and confusion by overruling *Hasselman* v. *McKernan, supra.* In the one case, we should unsettle what is harmoniously settled; in the other, we elect to follow one of two contradicting views, and disturb no settled and harmonious line of adjudications.

The form which the case assumes in this court by the method of appeal, and by the character of the assignment of errors, precludes us from determining the equities of the appellants as between themselves, but the issues will have to be reopened and the entire proceedings changed and pleadings remodelled, for the error in adjudging Wilson's lien to be the prior one pervades the entire cause.

Judgment reversed, with instructions to proceed in accordance with this opinion.

Filed March 25, 1884. Petition for a rehearing overruled May 28, 1884.

Dissenting Opinion.

Niblack, J.—I feel constrained to dissent from the conclusion reached in this cause, as well as from some of the reasons upon which the opinion is made to rest. The decision of the cause, as I construe the opinion, turns substantially upon the assumption that at the time Reeves purchased two of the Copeland notes, and received the mortgage securing them from Hayes, there was no law in force in this State authorizing the assignment of a mortgage to be recorded; that for that reason an assignment of the mortgage by Hayes to Reeves would have been unavailing as a means of affording notice to subsequent purchasers, and that, in consequence,

Reeves was not guilty of negligence in failing to obtain such an assignment from Hayes.

In the first place, an assignment from Hayes to Reeves would have conferred upon the latter the legal as well as the equitable title to a proportionate interest in the mortgage, and would, in some respects at least, have very much strengthened his claim to a share in the benefits of the mortgage.

In the next place, there was nothing decided in the case of *Hasselman* v. *McKernan*, 50 Ind. 541, which would have prevented Reeves from taking an assignment of an interest in the mortgage from Hayes, in a separate instrument in writing, executed with such formality as would have admitted it to record, and made the record of it constructive notice as much as the record of the mortgage itself. There has never been any rule of law, or anything in practice, that I am aware of, which has only permitted a mortgage to be assigned by endorsement, and it is only to assignments of mortgages made in that manner that the case of *Hasselman* v. *McKernan* has reference. The record of a mortgage might have been discharged, and the mortgage itself released by a separate instrument in writing. 2 R. S. 1876, p. 334, section 6. Then why might not a mortgage have been assigned in the same way? I can not agree, therefore, that Reeves did all that he might reasonably have done to make his interest in the mortgage purchased from Hayes a matter of record.

I am furthermore unable to resist the impression that the doctrine of the opinion antagonizes the spirit in which, as well as the purposes for which, our registration laws were enacted, and is, in fact, a departure from long recognized principles touching the subject of notice of secret equities in real estate.

Let me illustrate: Suppose I have negotiated with C. for the purchase of a tract of land, but wish to feel assured that his title is good before accepting a conveyance; I go to the record affording information on that subject and there find that A. had purchased the land which C. is proposing to sell to me from the Government of the United States. Then

turning to the record of deeds I further find that A. had conveyed the land to B., and that B. had conveyed it to C., in both cases by deeds regular upon their faces. Then suppose that, upon further examination, I find that no liens have been placed on record against the land, and hear of no secret outstanding equities in it adverse to C.'s title. Under such circumstances I assume that no one will claim that I would not be safe in accepting a conveyance from C. without further inquiry. And yet if the doctrine of the opinion on the subject of secret equities be sound in principle, and hence, of general application, it would be my duty, in addition to what I may have done as above, to seek out both A. and B., and ascertain whether each had received all the purchase-money to which he was entitled, and whether one or the other or both might not have put some incumbrance on the land which the records of the county did not disclose. As a reason for thus extending and applying the doctrine of the opinion, it might be said that I must take notice of the fact that a vendor of real estate has, under ordinary circumstances, a vendor's lien for unpaid purchase-money, and that the owner of land may, in many ways, put an incumbrance upon it without making the transaction a matter of record, and that, having notice that such a lien or incumbrance might have attached to or been put upon the land, I must, at my peril, ascertain whether the land is in fact free from all such liens or incumbrances.

This may be regarded by those favoring the conclusion reached in the case as an extreme illustration of the extent to which the doctrine of the opinion might be carried. Concede this to be so, and still I am unable to see any difference in principle between the hypothetical case presented and the inferences we are justified in making from the arguments used in support of the opinion.

If a subsequent purchaser may be put upon his inquiry as to what has become of the notes secured by a mortgage after the satisfaction of the mortgage has been entered in due

form by the mortgagee simply because he is presumed to know that such notes were by law assignable, and may, in consequence, have been assigned to some stranger to the mortgage record, why may he not, for the same reason, be put upon his inquiry as to whether some previous owner may not hold a vendor's lien for unpaid purchase-money, or as to whether there may not be some outstanding but unrecorded mortgage, or other secret incumbrance upon the land? I confess my inability to answer this question. If we are to be put upon our inquiry in this way as to all kind of secret equities, what becomes of the supposed protecting value of our registry laws? Will not confidence in titles to real estate be greatly impaired by such a holding? The doctrine of *caveat emptor* has a very strong application to sheriff's sales, and, in most respects, a purchaser of real estate at such a sale, simply takes the place of the execution defendant, and yet this court has decided that such a purchaser is protected against secret trusts of which he had no notice at the time of his purchase. *Milner* v. *Hyland*, 77 Ind. 458.

Section 5 of the act of May 4th, 1852, concerning mortgages, which was in force when the satisfaction of the mortgage in controversy in this case was entered, provided that every mortgagee of lands whose mortgage had been recorded, and who had received full payment of his mortgage, should, at the request of the mortgagor, enter satisfaction on the margin, or other proper place in the record of such mortgage, which should operate as a complete release and discharge thereof. 2 R. S. 1876, p. 334.

It will be observed that this statute enjoined primarily, and in a literal sense exclusively, upon the mortgagee, the duty of entering satisfaction on the mortgage record where full payment was made, and it is only by a liberal construction of the statute that it can be held that any one else could take the place of the mortgagee in entering satisfaction of the mortgage. I submit, therefore, that when Wilson found, on examination, that Hayes had entered satisfaction of the Copeland mortgage

on the mortgage record, he had the right to assume, in the absence of actual notice to the contrary, that the entry of satisfaction had been entered in good faith, and by competent authority, and to act upon that assumption. It is only where the discharge upon the mortgage record has been entered by some person other than the mortgagee, that the subsequent purchaser is put upon his inquiry as to the authority of the person who entered the discharge. 2 Jones Mort., section 957.

In the old case of *McCormick* v. *Digby*, cited in the opinion, this court said that "After a mortgagee has assigned the mortgage, he can not discharge any part of the premises from the mortgage," and that case has been cited approvingly, and followed, by Hilliard on Mortgages, and Washburn on Real Property, and perhaps other text-writers.

Jones on Mortgages, at section 814, asserts a similar doctrine, but with more elaboration, adding that an entry of satisfaction by a mortgagee, after he has parted with his interest in the mortgage, will be vacated by a court of equity.

As a general and as an abstract proposition, these authorities state the law correctly. A mortgagee, after he has assigned the mortgage, has neither the legal nor the moral right to discharge the mortgage, whether of record or otherwise. It is conceded that if he shall assume to discharge the mortgage after the assignment, his entry of satisfaction will be vacated, provided the rights of innocent third parties will not be thereby injuriously affected.

I have no right to receive payment of a note executed to me after I have assigned it. Yet, if I receive the money due upon it from the maker before he has notice of the assignment, he will be protected. I have no right, either legal or moral, to make a fraudulent conveyance of my land to the injury of my creditors, but if I shall make such a conveyance, and the land shall come into the hands of an innocent purchaser, my creditors can not have the conveyance set aside. I am utterly without authority to make a second conveyance of land which I have once owned, yet if I shall make

such a conveyance to an innocent purchaser, that is to say, to a purchaser without notice, either actual or constructive, of the first conveyance, he will hold the land to the exclusion of the first grantee.

I am, therefore, not contending for the application of any new principle to this case. I am only insisting that principles, generally and thoroughly recognized as governing analogous cases, shall be applied to transactions concerning the discharge of mortgages, or the release of mortgaged lands.

Thomas on Mortgages, at page 142, states, in a nut-shell, the doctrine I am seeking to maintain, as follows: "If a mortgage is discharged upon the record by a person who appears by the record to be the owner of it, even though it has actually been assigned, it will operate to cancel the mortgage as against subsequent purchasers and mortgagees in good faith and without notice, but as to all other persons, the validity of the mortgage will not be impaired."

Jones on Mortgages, at section 472, states the rule to be that "The registration laws and the doctrines of priority by record generally extend to assignments of mortgages as well. The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of the mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, * * the mortgage ceases to be a lien, as against one who purchases the property in good faith and without notice." See, also, section 878. The same author, at section 791, says that "The assignee of a mortgage, as a practical matter, should always give notice of the assignment to the holder of the equity of redemption, so as to surely protect himself against payments which may be made in good faith to the assignor. The recording of the assignment is not of itself such notice of the assignment as will afford such protection."

At section 820 it is further said, that "An assignment by

transfer of the debt only is effectual between the parties. The mortgage passes as an incident to the note. No assignment of the mortgage is necessary as between the parties, or as against the mortgagor or others having actual notice of the transfer of the notes. The mortgagor is bound to take notice of such an assignment upon the discharge of his debt, because proper diligence on his part demands that he should require the production of the notes before paying. But if the mortgagee, while the notes are in the hands of the assignee, cancels the mortgage on receiving payment from the mortgagor, who then makes conveyance or a new mortgage to another person, who acts in good faith and in ignorance of the fact that the original mortgage had not been paid to the proper party, such purchaser or subsequent mortgagee has the better title. Such subsequent purchaser or mortgagee is not bound to take notice of an assignment by transfer of the notes alone."

At section 967 it is still further asserted, that "If the giving up of the mortgage notes, or a formal discharge of the mortgage, has been obtained by fraudulent means, this is no payment and discharge of the mortgage. In such case a subsequent mortgagee, whose rights existed at the time of such discharge, can not object to the prior mortgagee being restored to his rights. And so also the mortgage will be reinstated, not only as against the mortgagor, but against one who has purchased from him with notice of the mortgage, or without giving any new consideration, and in whose favor no new rights have intervened since the release. Of course the mortgage can not be restored as against one who has in good faith purchased the property after the cancellation, or has advanced money upon it upon the faith of a clear record title. The mortgage can not be restored when the rights of innocent third persons will be affected."

In the case of *Bank of State* v. *Anderson*, 14 Iowa, 544, commented on in the opinion, the facts were that Anderson mortgaged his real estate to one Mobley to secure certain negotiable notes. Before the notes became due Mobley sold

and transferred them to the bank, but did not assign the mortgage. After this Anderson paid these notes to Mobley by conveying to him the mortgaged lands. Mobley thereupon, in his own name, by a proper writing upon the margin of the record, entered satisfaction of the mortgage.

Afterwards Mobley borrowed money of the Artisan's Bank of New York and secured its repayment by a mortgage on the same lands. Before taking this mortgage from Mobley the last named bank had the title examined by a competent attorney who reported that the lands had no incumbrance upon them. The Indiana Bank had no knowledge of the entry of satisfaction by Mobley and did not consent to it. The Artisan's Bank acted in good faith and had no notice that the mortgage executed by Anderson had not been paid to the proper person.

Upon these facts it was held that the second mortgage had priority. But the opinion says that this case is confessedly against the weight of authority. By whom is it so confessed? Certainly not by the Supreme Court of Iowa, for as stated in the opinion that court has followed that case in two later cases.

In the recent case of *Ogle* v. *Turpin*, 102 Ill. 148, the court stated the law to be that where a mortgagee, after an assignment of his notes secured by his mortgage, acquires the equity of redemption, and enters a formal release of the mortgage upon the record, a party taking a mortgage from him on the same premises, without notice of the assignment of the notes, will acquire a lien superior to that of the holder of the assigned notes; also that as there is no presumption of law that the payee of notes secured by mortgage has transferred the notes before purchasing the equity of redemption from the mortgagor, a person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage have been assigned, but he may rely upon the record as showing title in his mortgagor.

In the State of Kansas the registration laws, including a provision for discharging mortgages after they have been re-

corded, are very similar to ours. The Supreme Court of that State in the case of *Lewis* v. *Kirk*, 28 Kan. 497, also, very recently decided and involving the validity of the release of a mortgage by the mortgagee, after he had transferred the note by endorsement and the mortgage by delivery, reviewed some of its earlier decisions bearing on the same general subject in connection with the registration laws and other kindred statutes of the State. The concluding part of the opinion in that case is as follows:

"Under these statutes we think it is perfectly safe for any person who has no notice of outstanding equities to purchase real estate which the records of the county apparently show is free and clear from all incumbrances. * * * If the mortgage has been recorded and then has been regularly released on the margin of the record thereof by the mortgagee, then we think that any person, if he does it in good faith, may purchase the property in like manner freed from all liens and equities existing in favor of the holder of the mortgage; or in other words, and to state the proposition more succinctly, a purchaser in good faith of real estate may always rely upon the public records, subject only to the equities of persons in open, visible and exclusive possession of the property. A purchaser in good faith of real estate is never bound to take notice of secret equities, liens, interests, trusts or incumbrances, which can not be discovered from an inspection of the public records, or can not be ascertained by inquiries from the parties in possession. He may always rely upon the public records and such inquiries as they suggest, and such inquiries as are proper of the parties in possession; and if from all these the title appears to be clear, he will then obtain a good title, although there may be some outstanding equity or lien in favor of some other person. * * * Where a real-estate mortgage is executed to secure the payment of a negotiable promissory note, such mortgage will so far partake of the negotiable character of the note that whenever the note is transferred by endorsement before due so as to

free it from all equities existing in favor of the maker of the note, or prior endorsers, the mortgage will also be freed from such equities. But until the mortgage is recorded, such transfer will not prevent a third person, who has no notice of the mortgage or transfer, from purchasing the mortgaged property and thereby obtaining a full and absolute title to the property, free and clear from the mortgage lien. But when the mortgage is recorded, its negotiable character is then extended even to *bona fide* purchasers of the property, and it retains such character contemporaneously with the existence of the note to which it is an incident until the note is satisfied, or until the mortgage is released of record by the mortgagee, or his attorney, assignee, or personal representative; and that when the mortgage is so released it then loses its negotiable character to the extent that any third person who may then purchase the property in good faith will obtain the full, complete and absolute title thereto, freed from all equities, liens, interests, trusts or incumbrances existing in favor of any holder of the note and mortgage, whether the note is satisfied or not." See, also, *Burton* v. *Reagan*, 75 Ind. 77. Other extracts of the same import might be given, and numerous other authorities holding substantially the same doctrine might be cited, but I deem it unnecessary to add anything further in that respect.

I think most of the cases which seemingly hold a contrary doctrine will, upon a careful examination, be found to have reference only to the mutual relations existing between the parties to an assigned mortgage, and not to the rights of subsequent purchasers and subsequent mortgagees in good faith and without notice.

Of this latter class are the cases of *Carpenter* v. *Longan*, 16 Wall. 271, and *Gabbert* v. *Schwartz*, 69 Ind. 450. Section 814 of Jones on Mortgages, *supra*, rests mainly, if not entirely, on that class of cases.

I can not see that the cases of *Wolcott* v. *Winchester*, 15

Gray, 461, and *Bayless* v. *Glenn*, 72 Ind. 5, have any practical application to this case in any respect.

One paragraph of the syllabus of the case of *Trustees, etc.*, v. *Wheeler*, 61 N. Y. 88, to which reference is made in the opinion, is as follows: "It *seems* that a release, executed by the mortgagee after assignment, to one acting in good faith and without notice of the assignment, is valid, and as effective to work such discharge as if executed by the assignee."

As to the case of *Lapping* v. *Duffy*, 47 Ind. 51, I need only say at the present hearing that it was made sufficiently distinguishable from a case like the one at bar by what was said in the case of *Ayers* v. *Hays*, *supra*, which this court now refuses to follow.

The case of *Dixon* v. *Hunter*, referred to in the opinion, was not a parallel case with this in one essential respect, at least, and that is, in that case there was a formal assignment of the mortgage accompanying the transfer of the mortgage debt.

Although the transfer of a debt secured by a mortgage carries the mortgage security with it without an assignment of the mortgage, still, in such a case, the legal title remains in the mortgagee, and it is only through a court of equity, or a court possessing equity jurisdiction, that the security afforded by the mortgage can be made fully available to the assignee of the debt.

When a mortgagee transfers the mortgage debt, but fails to assign the mortgage, he becomes the trustee of the holder of the debt, and the value of the mortgage to the holder as a security must necessarily very much depend, as in cases of other trusteeships, upon the good faith as well as the business capacity of the mortgagee.

When, therefore, any one purchases a debt secured by a mortgage, and fails to take with the transfer of the debt to him an assignment of the mortgage, he must be presumed to know that his interest in the mortgage, as a security, constitutes only a secret equity, which may be wholly lost or destroyed by the bad faith, mismanagement or mistake of the

mortgagee, and these contingencies ought to be taken into consideration by the purchaser in estimating the value of the mortgage debt.

For the reasons given I can not escape the conclusion that Wilson is entitled to priority over the holders of the unpaid Copeland notes, and that, consequently, the judgment below ought to be affirmed.

Filed March 25, 1884.

Dissenting Opinion.

Zollars, J.—It will be seen by an examination of the principal opinion, and the dissenting opinion by Mr. Justice Niblack, that the point of difference is as to the priority of liens between the *bona fide* assignees and holders of notes secured by a prior mortgage, and a subsequent mortgagee in good faith, and for value, the prior mortgage having been cancelled and released by the mortgagee named therein, after he had parted with the notes, and before the execution of the second mortgage. To a number of the propositions of law stated in the principal opinion I yield ready assent. From the conclusion reached, and the principal reason upon which it is based, I am constrained to dissent.

I concur in the conclusion reached in the dissenting opinion, but do not think it is put upon sufficiently comprehensive ground. The whole controversy, I think, hinges upon the question, whether, at the time the mortgages were executed in 1873 and 1875, there was any law in this State for the recording of assignments of mortgages, and upon the force and effect to be given to the statute in relation to the cancellation of the mortgages upon the records.

In the absence of registry laws, the maxim "*Qui prior est tempore, prior est jure,*" applies both to legal estates and equitable rights. The sole purpose of registry laws is to protect subsequent purchasers against prior and unrecorded conveyances. In the absence of such laws prior grantees and mortgagees are superior in right, as they are in time, and

will be protected as against subsequent deeds and mortgages. It is by reason of these laws only that subsequent grantees and mortgagees may acquire superior rights to prior grantees and mortgagees, who have not recorded their conveyances within the time fixed by such laws. Broom's Legal Maxims, 353, *et seq.*; 2 Washb. R. Prop. 148; Jones Mort., sections 572, 576, 607; Wade Notice, sections 96, 162, 196; *Ely* v. *Scofield*, 35 Barb. 330; *Berry* v. *Mutual L. Ins. Co.*, 2 Johns. Ch. 603; Pomeroy Eq., section 413; *James* v. *Morey*, 2 Cowen, 246.

It is well settled that the assignment of the notes carries the mortgage as an incident, and that a mortgagee and his assignee are regarded as purchasers under the registry laws. *Bowling* v. *Cook*, 39 Iowa, 200. It is well settled, too, that after a mortgagee has parted with the notes secured by a mortgage, he has no power to extinguish the mortgage by a release upon the records or otherwise. Such a release does not affect the mortgage as to the assignee or mortgagor. It has no effect other than to postpone the lien as to subsequent encumbrancers in good faith and for value. And it will not have this effect unless the assignee has been guilty of negligence in not taking and recording an assignment of the mortgage under the registry laws, or has been guilty of some wrong or laches whereby the subsequent encumbrancer has been induced to rely upon the release of record, or unless he may rely upon such release in any event. It must be manifest that a party can not sell and convey title to property which he has once sold and conveyed, and that he can not extinguish a mortgage which has passed from him by assignment, and in which he has no longer any interest.

In all cases where the subsequent grantee or encumbrancer acquires the superior right, it is not because the grantor has the power to convey two titles to the same property, but because the first grantee is precluded by some kind of estoppel, or act of negligence, under the registry laws or otherwise. In the statutes of many of the States, a prior conveyance is

declared to be void, as against a subsequent *bona fide* purchaser, unless recorded within the fixed time.

Where rights of innocent third parties have not intervened, a release of a mortgage without authority, or procured by fraud, will be set aside in favor of the assignee. It will not be, however, as against *bona fide* subsequent grantees or encumbrancers, where the assignee has been guilty of negligence or wrongs that ought to estop him. The authorities cited in the principal and dissenting opinions are not in conflict, but in harmony with this statement. In the case of *McCormick* v. *Digby*, 8 Blackf. 99, no rights of third parties were involved.

The section cited from Thomas on Mortgages is simply that if a mortgage is thus released after assignment, the release will be valid as to subsequent purchasers in good faith, but will have no effect as to others. The author refers to the case of *Ely* v. *Scofield*, *supra*, where it was held that such a release did not affect the validity of the mortgage, but simply took away its priority over the deed of a subsequent purchaser in good faith. The statement in Jones on Mortgages, section 814, that a satisfaction entered by the mortgagee after the assignment of the note may be set aside, is upon the assumption, as therein stated, that there is no statute requiring the assignments of mortgages to be recorded. The cases cited in support of the text are all cases in which no rights of third parties, as subsequent grantees or encumbrancers, were involved. Such were the cases of *Gordon* v. *Mulhare*, 13 Wis. 22. The case of *Sample* v. *Rowe*, 24 Ind. 208, cited, so far as it bears upon the question, supports the proposition as I have stated it.

In the case of *Lapping* v. *Duffy*, 47 Ind. 51, the subsequent mortgagees were not innocent mortgagees, for the reason that there was an unsatisfied judgment of foreclosure, which was notice to them. There is no hazard in asserting that the doctrine as I have stated it is the well settled doctrine, and that the cases in which such releases have been set aside have been

cases between the immediate parties, and not involving innocent third parties. Occasionally a statement will be found in text-books that such a release will be set aside as against subsequent purchasers; but upon an examination of the cases cited in support of the text, it will be found that the subsequent purchasers were not subsequent to the release, but only subsequent to the mortgage thus satisfied. The difference is very apparent, and very important. Such are the cases of *Harrison* v. *Johnson*, 3 C. E. Green (N. J. Eq.) 420; Jones Mort., section 967; *Robinson* v. *Sampson*, 23 Maine, 388.

It will be found upon an examination of the cases cited in both the principal and dissenting opinions, that the subsequent encumbrancers were protected because of provisions of the registry laws, or because of the negligence of the assignee in not taking and recording an assignment of the mortgage under the registry laws. In the case of *Bank of State of Indiana* v. *Anderson*, 14 Iowa, 544, the question arose between the assignee of notes secured by a mortgage and a subsequent mortgagee, the first mortgage having been cancelled of record by the first mortgagee after he had assigned the notes, and before the execution of the second mortgage. The second mortgagee examined and relied upon the records. It was held that, having done this, he was not chargeable with negligence; that under the laws of Iowa an assignment of a mortgage may be recorded; that the assignee of the notes might have protected himself and the second mortgagee, against the fraud of the first mortgagee, by taking an assignment of the mortgage and putting it on record, and that, not having taken that precaution, he was guilty of such negligence as would subordinate his lien to the lien of the subsequent mortgage. This case was not doubted, but cited in the cases of *McClure* v. *Burris*, 16 Iowa, 591, *Walker* v. *Schreiber*, 47 Iowa, 529, and other cases in that State. The case of *Ogle* v. *Turpin*, 102 Ill. 148, is similar in facts with the Iowa case, and a like ruling was made. After holding that the law of Illinois authorizes the recording of assign-

ments of mortgages, the court, per Mr. Justice DICKEY, said: "When a man buys notes secured by mortgage he becomes thereby the equitable assignee of the mortgage, and acquires an equitable interest in the mortgaged lands. If he wishes to protect that interest against subsequent purchasers, he may do so by taking a written assignment of the mortgage, and placing that assignment upon record." The case of *Lewis* v. *Kirk*, 28 Kan. 497, in its facts, is similar to the Iowa and Illinois cases, and the one at bar. The decision is under a statute, held to authorize the recording of assignments, and the subsequent purchaser was protected. Section 472, Jones Mort., cited, is in harmony with these cases. It is as follows: "472. The registration laws and the doctrines of priority by record generally extend to assignments of mortgages as well. The assignment is invalid against subsequent purchasers without notice unless it is recorded. Consequently if a mortgagee transfers the note secured by the mortgage, or makes a formal assignment of the mortgage which is not recorded, and afterwards enters a satisfaction of the mortgage upon the record, * * the mortgage ceases to be a lien, as against one who purchases the property in good faith and without notice," etc., and so of section 820, Jones Mort., also cited. In that section it is said: "Such subsequent purchaser or mortgagee is not bound to take notice of an assignment by transfer of the notes alone. The assignee of the notes can easily protect himself by requiring an assignment of the mortgage and recording it, and thus give notice of his rights; and if he omits to do this, he should be the party to suffer for the negligence," etc. This section is based upon the Iowa cases. And so the statement in Thomas Mort., p. 142, is based upon New York cases, which hold that assignments of mortgages may be recorded, and charge negligence upon the assignee who neglects to take an assignment of the mortgage, and put it upon record. See the same work, pp. 118, 150, 154, 159.

In accord with this doctrine is the late case of *Williams* v. *Jackson*, decided by the Supreme Court of the United States, as

we find it reported in The Central Law Journal, vol. 17, p. 148: A. sold land to B., and for the purchase-money took four notes, executed by B. These notes were secured by a trust deed, executed by B. and wife to C., who, upon full payment, was to release and convey the land to D., the wife of B. This trust deed was recorded in January, 1875. These notes were endorsed to Jacksons. After this, on the 15th day of September, 1876, and without the knowledge of Jacksons, the trustee and A. executed a deed of release to D., the wife of B., reciting therein that the debt had been paid. B. and wife about this time were seeking to make a loan upon the land. The appellant agreed to loan the money if satisfied by a conveyancer's abstract that the land was free of all encumbrance, but not otherwise. The release being put upon record, and the appellant being thereby satisfied as to the title, he advanced $5,000, received a note executed by B., secured by a trust deed by B. and wife. Jackson filed his bill to have the release and subsequent conveyances declared void as against the first trust deed, and the trust created by that deed be declared to have priority over all subsequent encumbrances. After reciting the statute of the District of Columbia, which provides that any title bond or other written contract in relation to land may be acknowledged and recorded in the same manner as deeds of conveyance, the court, per Mr. Justice GRAY, said, that the assignee of the notes, having taken no precaution to obtain, and put on record, an assignment of his rights in such form as would be notice to all the world, was bound by the release, as against any one acting upon the faith of the record, and ignorant of the real state of facts; and, further, as follows: "If the plaintiffs wished to affect subsequent purchasers with notice of their rights, they should have obtained a new conveyance or agreement, duly acknowledged and recorded, in the form either of a deed from the original grantors, or of a declaration of trust from the trustees, or of an assignment from Augustus Davis (A.) of his equitable interest in the land as security for the payment of

the notes. The record not showing that any person other than Augustus Davis (A.) had any interest in the notes or in the land as the security for their payment, an innocent subsequent purchaser or encumbrancer had the right to assume that the trustees, in executing the release, had acted in accordance with their duty. * * * It was suggested in argument that as the first deed of trust showed that the notes secured thereby were negotiable and were not yet payable, and that the land was not intended to be released from this trust until all the notes were paid, Williams" (appellant) "was negligent in not making further inquiry into the fact whether they were still unpaid. But of whom should he have made inquiry? The trustees under the first deed, and the original holder of the notes secured thereby having expressly asserted under their own hands and seals that the notes had been paid, and Sweet (B.) and wife having apparently concurred in the assertion by accepting the deed of release and putting it on record, he certainly was not bound to inquire of any of them as to the truth of that fact; and there was no other person to whom he could apply for information, for he did not know that the notes had ever been negotiated, and he had no reason to suppose that they had not been cancelled and destroyed. To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof or knowledge, fraud or gross or wilful negligence on his part, would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business."

As supporting the same doctrine, and upon substantially the same grounds, see *Clark* v. *Jenkins*, 5 Pick. 280; *Henderson* v. *Pilgrim*, 22 Texas, 464. The case of *Summers* v. *Kilgus*, 14 Bush, (Ky.) 449, was decided in favor of the subsequent purchaser, upon the two grounds, viz., that the statute provides for a release of a mortgage lien by the person entitled to the same, and for a register of assigned notes.

The case of *James* v. *Morey*, *supra*, cited and quoted from

in the principal opinion, was decided upon the ground that at the time the rights of the parties became fixed there was no law requiring or authorizing the recording of an assignment of a mortgage. It differs with the case in hearing in that there was no cancellation of record or otherwise. The subsequent purchaser bought with the mortgage on record unsatisfied. It was held that the assignee was not guilty of any wrong or negligence in not giving notice, because no way was provided by which he could give such notice, and that as the mortgage was of record unsatisfied, it was enough to put the purchaser upon inquiry, and that he was guilty of negligence in not making such inquiry and ascertaining whether or not it was a subsisting lien.

It is an enunciation of the doctrine that where loss must fall upon one of two parties by the wrong of a third, he shall be protected who is guilty of the least negligence. If in the present case there was no law for the recording of the assignment of the mortgage, and the subsequent mortgagee was not justified in relying upon the cancellation on the records, no fault or negligence can be charged upon the assignees of the notes; neither can any wrong or negligence be charged upon the subsequent mortgagee, unless he was guilty of negligence in relying upon the records showing a release of the mortgage. If neither party was guilty of negligence, the rights of the assignees of the notes, being prior in time and equal in equities, must be protected. This brings us to the statutes of this State and the decisions thereunder. The principal opinion is based upon the theory that prior to 1877 these statutes contained no provisions for the recording of assignments of mortgages, nor any other provision which protected the innocent subsequent mortgagee in a case like the present. Much importance is given to the case of *Lapping* v. *Duffy*, *supra*, and its citation in the cases of *Marshall* v. *Stewart*, 65 Ind. 243, *Teal* v. *Hinchman*, 69 Ind. 379, *Evansville, etc., Co.* v. *State, ex rel.*, 73 Ind. 219, and *Hunt* v. *Elliott*, 80 Ind. 245.

I have already referred to the case of *Lapping* v. *Duffy*,

supra. That case was as follows: A. executed notes to B., and a mortgage to secure them. B. assigned the notes to C., who foreclosed the mortgage. C. assigned the judgment to D. Quite a while after this, and while the judgment was in full force, B., without any interest in the mortgage, and without authority, made an entry of satisfaction on the record of the mortgage. After this, A. executed mortgages on the same real estate to E. and others. The contest was between D., the owner of the judgment of foreclosure, and the junior mortgagees. It was held that B. had no authority to cancel the mortgage; that the mortgage was not so merged in the foreclosure as to destroy its lien, and that the lien in favor of the owner of the foreclosure judgment was, therefore, prior to the subsequent mortgages. It is not stated in the opinion whether this priority was because there was no law for the recording of assignments of mortgages, or because the record of the foreclosure was notice to the subsequent mortgagees. That this record was constructive notice to the subsequent mortgagees I think there can be no doubt. Upon this theory no fault can be found with the decision. The citation of the case, in *Marshall* v. *Stewart*, *supra*, was in support of the single proposition that a promissory note is merged in the judgment upon it. In the case of *Teal* v. *Hinchman*, 69 Ind. 379, the contest was as to the priority of an unpaid mortgage, which had been foreclosed, over subsequent mortgages. The Lapping case was cited only in support of the proposition that the mortgage was not merged in the judgment of foreclosure, in such sense as to defeat the lien of the mortgage.

It was also cited in the cases of *Evansville, etc., Co.* v. *State, ex rel.*, *supra*, and *Hunt* v. *Elliott*, *supra*, in support of the single proposition, that a mortgage is not thus merged in a judgment of foreclosure. Neither the Lapping case nor any of the cases, *supra*, in which it is cited, is an adjudication upon the question as to whether or not, prior to 1877, there was any law in the State for the recording of assignments of mortgages, nor does it or any of those cases settle

what the rights of the parties might have been, had there been no record of a foreclosure. It is said in the principal opinion that these cases, together with the case of *Hasselman* v. *McKernan*, 50 Ind. 441, and its citation in the subsequent cases of *Coombs* v. *Carr*, 55 Ind. 303, *Dixon* v. *Hunter*, 57 Ind. 278, *Cain* v. *Hanna*, 63 Ind. 408, and *Hosford* v. *Johnson*, 74 Ind. 479, and the support given it in the case of *Etzler* v. *Evans*, 61 Ind. 56, constitute "an unruffled line of decisions" in support of the doctrine held in the principal opinion. Let us see if that is so. As already seen, the case of *Lapping* v. *Duffy*, *supra*, and the cases in which it is cited, have but a very remote bearing, if any bearing at all, upon the questions at issue in the case before us.

In the case of *Hasselman* v. *McKernan*, *supra*, the contest was whether the assignee of a junior mortgage and notes secured thereby could redeem from a sale under a prior mortgage, in the suit to foreclose which he had not been made a party. It was held that as junior mortgagee he could. It is said in the opinion that in the action to foreclose the prior mortgage, the holder of it might have put an interrogatory to the assignor of the junior mortgage, and thus have learned whether or not he had assigned it, and if so, to whom. And that thus the assignee might have been made a party and concluded by the decree. In speaking of the assignee of the junior mortgage, and his right to redeem, it was said: "We have no statute providing for the recording of assignments of mortgages, and making such record notice; hence the plaintiffs" (assignees of the junior mortgage) "were guilty of no laches." This is the whole of the decision in relation to the question as to whether or not, under the statutes, assignments of mortgages might be recorded, so as to give notice. It is apparent, I think, from the brief manner in which the question was disposed of, that the learned judge who wrote the opinion did not regard it as vital to a decision of the case, and hence did not give it a very thorough examination. Our registry laws are in no way referred to except by the general statement. It had

been decided many times previous to this that a junior mortgagee, not made a party to a suit to foreclose a senior mortgage, might redeem therefrom. *Proctor* v. *Baker*, 15 Ind. 178; *Murdock* v. *Ford*, 17 Ind. 52. I do not take the time to cite the other cases.

Hasselman v. *McKernan* is cited in the cases of *Coombs* v. *Carr*, *supra*, *Cain* v. *Hanna*, *supra*, and *Hosford* v. *Johnson*, *supra*, in support of the single proposition that junior encumbrancers have the right to redeem from a sale on a prior mortgage. Neither of these cases decides anything in relation to the law for the recording of assignments, nor do they decide anything bearing upon the case at bar. In the case of *Dixon* v. *Hunter*, *supra*, which involved the right of a junior mortgagee to redeem from a sale under a prior mortgage, the Hasselman case was cited with approval, although the decision was based, in the main, upon the case of *Lapping* v. *Duffy*, *supra*, already examined. Here, again, there is no reference to our registry laws except the general statement.

The case of *Etzler* v. *Evans*, 61 Ind. 56, cited as in harmony with the above cases, and as supporting the doctrine of the principal opinion, decides nothing akin to any question involved in the case in hearing, except that the recording of an instrument not authorized by law to be recorded is notice to no one. This proposition I do not controvert, nor is it controverted in the opinion by Mr. Justice NIBLACK. That, however, is decisive of nothing here.

Thus we have one adjudication only once cited and approved, that prior to the act of 1877, section 1093, R. S. 1881, there was no law in this State for the recording of assignments of mortgages. This is the whole of what in the principal opinion is called a line of decisions.

On the other hand, in the case of *Fox* v. *Wray*, 56 Ind. 423, it seems to have been taken for granted that, as against the assignee of notes secured by mortgage, a purchaser in good faith, after a release of record had been made by the mortgagee, would be protected. In the case of *Ayers* v. *Hays*,

60 Ind. 452, the question came squarely before the court for the first time as the controlling question in the case, and it was held that the subsequent encumbrancer should be protected.

Without referring to or citing it, the doctrine of this case was distinctly asserted in the case of *Burton* v. *Reagan*, 75 Ind. 77. In that case the mortgage had been released upon the records by the mortgagee after he had assigned the notes. The question was whether subsequent purchasers in good faith should be protected. The court said (p. 81): "But, if the Reagans were innocent purchasers of the land, they took it discharged of the mortgage lien of Hadley." Hadley was the assignee of the notes secured by the mortgage.

The majority opinion treats the case of *Hasselman* v. *McKernan*, *supra*, and the case following it, as in irreconcilable conflict with the case of *Ayers* v. *Hays*, *supra*, and the cases following it, and hence overrules the latter cases. In regard to the case of *Ayers* v. *Hays*, *supra*, it said in the principal opinion: "*Ayers* v. *Hays*, 60 Ind. 452, does decide this question, and against the view here declared; but it is evident that in that case the court proceeded on the theory that assignments were entitled to record. We quote from the opinion the following: 'In the case at bar, there was nothing on record, when Hays and Butcher purchased the mortgaged property, indicating that Campbell had parted with the note in suit, or that it remained unpaid, or that Campbell was not fully authorized to enter satisfaction of the mortgage, or had made any mistake in such entry of satisfaction.'" It is further said in the principal opinion: "As between *Ayers* v. *Hays*, *supra*, and *Dixon* v. *Hunter*, *supra*, there is irreconcilable conflict, and we must choose one or the other of them."

Why is the case of *Ayers* v. *Hays*, *supra*, and the cases supporting it, in irreconcilable conflict with the cases of *Hasselman* v. *McKernan*, *supra*, and *Dixon* v. *Hunter*, *supra*? Because, as stated in the principal opinion, the Hasselman and Dixon cases are, in a measure, based upon the idea that prior

to the act of 1877 there was no law in this State for the recording of assignments of mortgages; while the Ayers case is based upon the idea that there was such law. What is the result of this irreconcilable conflict? I understand the rule to be well settled that where two cases, by the same court, are in irreconcilable conflict upon a proposition of law, the later decision controls, and overthrows and overrules the former. If that be so, then the Hasselman and Dixon cases, reported in 50th and 57th Ind., have been overthrown and overruled by the Ayers case, reported in 60th Ind.

The question then is, shall we now overthrow the Ayers case, and go back to the overruled Hasselman case, and the Dixon case based upon it, especially when we are informed in the principal opinion that some of the members of the court concurring in that opinion regret the decision in the Hasselman case? The act of 1877, for the recording of assignments of mortgages, can not properly be said to be a concurrence by the Legislature in the Hasselman case, decided in 1875. It was simply a yielding to the authority of the court in the Hasselman case, and at the first opportunity passing an act to supply a deficiency declared in that case by the court to exist. And suppose we now overthrow the Ayers case, and return to the Hasselman and Dixon cases, what then?

Under the reasoning in the principal opinion, as I understand it, the decision in the Ayers case would be good law if made under the act of 1877. Under the authorities, there can be no doubt about this. It will follow, therefore, that in all cases like the one in hearing, arising subsequent to that act, we shall have to reassert the doctrine of the Ayers case. To concede this is to concede what will overthrow the argument in the principal opinion, that the commercial quality of mortgage notes is, in some measure, a controlling consideration in the decision of this case. If that were a controlling consideration, it would not be taken away by the act of 1877. That act does not provide for the recording of assignments of such notes. It provides for the recording of assignments

of mortgages. The fact is, these are not the notes of the commercial world. In the whirl and rush of business transactions, business men and banks do not stop to investigate titles to real estate to see if the mortgage note is well secured, but rely upon personal security. Such notes are taken in the commercial world, in the main, from failing debtors only. The act of 1877 was not intended to, nor does it in any way, affect the commercial quality of mortgage notes. Suppose a case just like this should arise under that act; the notes are assigned in writing, but the mortgage is not. The assignee of the notes can not record the assignment, because the law makes no provision for such record. Will the commercial quality of the notes protect the holder as against an innocent mortgagee, subsequent to a cancellation of the first mortgage, by the mortgagee therein named? If not, why not? Because registry laws are intended to furnish a ready and reliable means of knowledge to subsequent purchasers. That knowledge may be relied upon with security. That security is the object of the registry laws of whatever nature. The assignee of mortgage notes must use every means furnished by the law, to give notice to subsequent purchasers. Hence, if he may record an assignment of the mortgage, he is bound to procure such assignment and put it on record. If he contents himself with an assignment of the notes only, his rights will be subordinated to the lien of a subsequent mortgagee, acting upon the faith of the records.

For the sake of consistency, uniformity in our decisions, and because I believe that the Ayers case was correctly decided, I am opposed to the overruling of it. And because I believe that the Hasselman and Dixon cases were not correctly decided, so far as they affect any question involved in the case in hearing, I am opposed to reinstating them, or reaffirming the doctrine of them.

A proper estimate of the above cases, and a proper decision of the question before us, necessarily involve a proper construction of our registry laws. At the time the mortgage

was released, there was in force the following statute, with others, viz.: "Every mortgagee of lands whose mortgage has been recorded, having received full payment of the sum or sums of money therein specified, * * * shall * * * enter satisfaction on the margin or other proper place in the record of such mortgage, which shall operate as a complete release and discharge thereof." 2 R. S. 1876, p. 334, section 5.

It has been held by the Supreme Courts of Kentucky and Ohio, that subsequent purchasers and encumbrancers may rely upon such cancellation of record, and will be protected as against the assignees of the notes secured by the mortgage, without reference to laws for the recording of assignment of mortgages.

In the case of *Swartz* v. *Leist*, 13 Ohio St. 419, the mortgagee, after he had assigned the notes, and before they were all due, cancelled the mortgage on the records. After this, a party relying upon the record, purchased the real estate covered by the mortgage. The statute of Ohio, in relation to the cancellation of mortgages, is substantially the same as ours. Mr. Justice SCOTT, in delivering the opinion of the court, said: "But the parties here are not equally faultless, and do not stand *in æquali jure*. Swartz negligently or confidingly permitted Little, the mortgagee, to retain the legal title conveyed by the mortgage, and the power of control over it. Little had thus the legal power, and, ostensibly, a perfect right to discharge and release it. Leist, the purchaser, having no reason to suspect fraud, was justified in regarding the release legally made, by one who was ostensibly the proper party, as an effectual discharge of the lien. And as between these parties, he who unwisely reposed confidence in Little, and gave him the power to defraud, should suffer the consequences. * * It is claimed that the release entered on the record, in this case, was inoperative, under this statute, because the note held by Swartz had not matured at the time, and was therefore not 'due,' within the meaning of the statute; and for the further reason, that '*payment of the money*' was not, in fact,

'*received.*' This statute was intended to facilitate the discharge of mortgage liens. It is remedial in its character, and should be liberally construed. * * * And as to the want of actual payment—so far as respects the lien of the mortgage, the mortgagee is clearly estopped by his recorded release, from denying, as against subsequent purchasers in good faith, the payment thus evidenced by his own act. And this estoppel must be equally effective against the holder of a latent equity, arising from contract with the mortgagee."

The Kentucky statute provides that "Liens, by deed or mortgage, may be discharged by an entry acknowledging satisfaction of the same on the margin of the record thereof, *signed by the person entitled to the same,* * * * and attested by the clerk, * * * which, in case of a mortgage, * * * shall have the effect to reinvest the title in the mortgagor," etc. The Supreme Court held that the purchaser, relying upon a cancellation made by the mortgagee, under this statute, should be protected as against the holder of the notes by assignment, and said: "This provision indicates that it was the intention of the Legislature that a release, made in conformity to the statute by the proper person, should have the same effect as a deed of release, and that it should furnish an abiding evidence of the extinguishment of the lien; and we are of the opinion that, fraud aside, it is conclusive when invoked by a subsequent vendee for his protection against liens which it purports to release." *Summers* v. *Kilgus*, 14 Bush, (Ky.) 449. See, also, to somewhat the same effect, *Ely* v. *Scofield*, 35 Barb. 330.

These cases support the reasoning of Mr. Justice NIBLACK, in his dissenting opinion, and in my judgment they state a reasonable rule. As between the immediate parties to a conveyance or mortgage, the registry laws neither add to nor detract from the instrument. The sole purpose of such laws is to facilitate transactions in real property by affording an easy and safe means of ascertaining the condition of titles, and at the same time protect subsequent purchasers. As a

part of the system, and for the same purpose, we have the statute for the cancellation of mortgages on the records. It will hardly do to charge the subsequent purchaser with negligence because he relies upon the records thus provided for by law. If he finds the mortgage cancelled on the records, by the party declared by law to be the proper party to make such cancellation, what more can be reasonably required of him? Must he in every case be required to demand a production of the notes secured by the mortgage? As is very frequently the case, they may have been destroyed by the mortgagor after they were paid, and their production thus rendered impossible. In such case, must the mortgagor be crippled in the conveyance of his real estate, because he can not produce such notes?

Suppose, on the other hand, that the notes have been transferred, and they are not paid, but by collusion between the mortgagor and the mortgagee the latter has entered a satisfaction of the mortgage on the records in the manner provided by law, of whom, in such case, must the subsequent purchaser make inquiry? He can not go to the assignee of the notes, because he has no means of knowing who he is—he has no means of knowing that the notes have been assigned. If he goes to the mortgagor and mortgagee, they will falsify in relation to the notes as they have falsified upon the records. If the release upon the records may not be relied upon, what is the purpose of such release? If the mortgage has been discharged by payment, it is no longer of any force, whether cancelled upon the records or not. Why, then, such cancellation? Simply to furnish reliable information to subsequent purchasers. I, however, go further, and maintain that the statutes provided for the recording of assignments of mortgages, and that the assignees of the notes were thus provided with a means of protecting themselves and the subsequent mortgagees by taking an assignment of the mortgage and putting it on record, and that, not having done so,they were guilty

of negligence, on account of which their liens should be postponed to that of the subsequent mortgage.

We find the following in the statutes as they existed when the release and mortgage in controversy were made:

Section 16, 1 R. S. 1876, p. 365: "Every conveyance or mortgage of land, or of any interest therein, * * * shall be recorded," etc.

Section 18, 1 R. S. 1876, p. 365: "To entitle any conveyance, mortgage or *instrument of writing* to be recorded, it shall be acknowledged by the grantor," etc.

Section 19, 1 R. S. 1876, p. 366: "When any conveyance, mortgage, or *other instrument* required to be recorded, is acknowledged," etc.

Section 33, 1 R. S. 1876, p. 368: "The term 'grantor,' as used in this act, shall be construed to embrace every person by whom any estate or *interest* in lands is *created*, granted, bargained, sold, conveyed, *transferred*, or *assigned*."

Section 34, 1 R. S. 1876, p. 368: "*All instruments of writing of and concerning lands, or concerning any interest therein, * * shall be deemed a conveyance within the provisions of this act*," etc.

Section 7, 2 R. S. 1876, p. 335: "*The recording of the assignment of a mortgage* shall not be deemed, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them to the mortgagee, or any assignee, before actual notice of such assignment."

If these statutes did not authorize the recording of assignments of mortgages, then the last section above set out is utterly meaningless. These sections, and especially the last, were evidently copied from the statutes of New York, where they had been interpreted and held to authorize and require the recording of assignments of mortgages. So our Legislature doubtless understood them when they were enacted. If not, what was the purpose of this seventh section? Is it to have no meaning? Is the Legislature to be convicted of having done a foolish and useless thing? Is there no case to which this section can be applied? If there is this is the case.

This section assumes that such assignments may be recorded, and that when so recorded, the record shall be constructive notice to all parties interested, except those specially named. In my judgment, this section of itself was sufficient authority for the recording of the assignment. It was doubtless, too, the legislative understanding that the other sections of the statute provided for the recording of such assignments when properly acknowledged. The terms are comprehensive. Every conveyance when acknowledged by the grantor shall be recorded. Sections 16, 18 and 19, *supra.*

The term grantor shall be construed to embrace every person by whom any estate or *interest* in land is *created, transferred or assigned.* Section 33, *supra.*

All instruments in writing of and *concerning any interest* in land shall be deemed a conveyance within the provisions of the act. Section 34, *supra.*

Can there be any doubt about these terms being sufficiently comprehensive to embrace the assignments of mortgages? Is not a mortgage an instrument in writing of and concerning an interest in land, under this statute? Is not the assignment of a mortgage a transfer and assignment of an interest in the land under this statute? Does not the term grantor embrace the assignor of a mortgage under this statute? If not, what do these terms mean as used in the statute? They can not refer to a deed, because a deed can not be assigned. A mortgage does not convey the legal title, but it conveys a greater interest in the land than any other instrument except a deed. Under the above statute, a mortgage is clearly a conveyance of an *interest* in the land mortgaged.

The 18th section of the statute of descents, 1 R. S. 1876, p. 411, provides that a second wife, in the case named, may not *alienate* real estate held in virtue of a previous marriage. In construing this statute, this court, in the case of *Vinnedge* v. *Shaffer*, 35 Ind. 341, said: "A mortgage is in some sense an alienation and fairly within the prohibition of the stat-

ute." This case was cited and fully approved in the similar case of *Bowers* v. *Van Winkle*, 41 Ind. 432. It has been many times cited with approbation; I cite some of the cases: *Scott* v. *Greathouse*, 71 Ind. 581; *Connecticut Mutual Life Ins. Co.* v. *Athon*, 78 Ind. 10; *Schlemmer* v. *Rossler*, 59 Ind. 326; *Unfried* v. *Heberer*, 63 Ind. 67; *Edmondson* v. *Corn*, 62 Ind. 17; *Miller* v. *Noble*, 86 Ind. 527

And so, in the case before us, a mortgage is a conveyance of an interest in the land covered by it.

The registry laws of Kansas bearing upon the question here involved, as we find them set out in the case of *Lewis* v. *Kirk*, 28 Kan. 497 (42 Am. R. 173), are as follows: "Every instrument in writing that conveys any real estate, or whereby any real estate may be *affected*, * * * may be recorded in the office of the register of deeds of the county in which said real estate is situated." It is provided further, that the record of such instrument shall impart notice to others. "No such instrument in writing shall be valid, except between the parties thereto and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

Section 3, referred to in this case, is as follows: "The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee." Gen. Stat. Kan., 1868, p. 582.

Another section of the statute provides for the cancellation of the mortgage on the records. The mortgage in the case, *supra*, had been cancelled by the mortgagee after he had assigned the notes. The question in the case is thus stated by the court: "The question now arises, who shall suffer from the fraud of Shaver—the *bona fide* holder of the note and mortgage, or the *bona fide* purchaser of the mortgaged property?" In speaking of the statutes above set out, the court said: "Sec. 3 of the act concerning mortgages recognizes 'the recording of the assignment of a mortgage.'

* * * And section 5 of the act relating to frauds and perjuries provides that no interest in lands exceeding one year in duration shall be assigned or granted, unless it be by some deed or note in writing, signed by the party assigning or granting the same. * * * Under these statutes we think it is perfectly safe for any person who has no notice of outstanding equities to purchase real estate which the records of the county apparently show is free and clear from all incumbrances. * * * Or, if the mortgage has been recorded and then has been regularly released on the margin of the record thereof by the mortgagee, then we think that any person, if he does it in good faith, may purchase the property in like manner freed from all liens and equities existing in favor of the holder of the mortgage."

It will be noticed that the terms of the Kansas statutes are not as comprehensive as those used in our statute, and that section 3, of that statute, is the same as section 7 of ours, above set out. This case thus becomes an authority squarely in point in support of the proposition, that under our statutes in 1873 and 1875, assignments of mortgages might have been recorded, and thus afforded notice to subsequent encumbrancers.

The statutes of Iowa provide that no instrument affecting "*real estate*" shall be valid against subsequent innocent purchasers, unless recorded. R. S. Iowa, 1860, p. 391.

The phrase "*real estate,*" as used in this statute, is declared by another statute to include all rights thereto and interests therein, equitable as well as legal. R. S. Iowa, 1860, p. 5, section 29.

In the case of *Bank of the State of Indiana* v. *Anderson*, 14 Iowa, 544, the contest, as already stated, was between the assignee of notes secured by a prior mortgage, and a subsequent *bona fide* mortgagee, after the first mortgage had been cancelled by the first mortgagee. In passing upon the case, and in construing the above statutes, the Supreme Court said:

"But, again, a mortgagee is a purchaser within the mean-

ing of our recording acts. *Porter* v. *Green*, 4 Iowa, 571; *Seevers* v. *Delashmutt*, 11 *Id.* 176. Under this law, therefore, appellants are purchasers. An instrument affecting this estate is, therefore, invalid as against them, until it is recorded, and by 'real estate,' is meant 'all *rights thereto and interest therein*, equitable as well as legal.'* * The statute has thus given a general rule, and, unlike those of many of the States, has not undertaken to prescribe special regulations for the different instruments affecting real property. Some of the States, for instance, after providing a general law upon the subject of mortgages and conveyances, expressly require assignments of mortgages to be recorded. Our law, by using general terms, well defined and understood, obviates the necessity of more specific legislation. And, in view of this legislation, why should the assignee of a mortgage be exempt from the duty of placing upon record that which evidences his title to the 'right or interest' thus purchased."

The statute of Minnesota, after providing that conveyances of real estate, to be effectual against subsequent purchasers, shall be recorded, that the word "purchaser" shall include assignees of mortgages, etc., and that the term "conveyance," as used in the statute, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created or assigned, etc., or by which the title to any real estate may be affected, etc., further provides as in section 7 of our statute, above set out, that the recording of assignments of mortgages shall not of itself be notice to the mortgagor, etc. Statutes of Minn., 1849–1858, sections 24, 26, 29 and 30.

The construction given to these sections by the Supreme Court of that State is, that assignments of mortgages may, and must be recorded to protect the assignees of the notes against a subsequent mortgagee in good faith. *Johnson* v. *Carpenter*, 7 Minn. 176.

The statutes of Illinois provide that deeds or other written instruments relating to the conveyance of real estate, or

any interest therein, or affecting the title thereto, etc., shall be acknowledged and recorded in order to affect subsequent purchasers; that the term "real estate," as used in the statute, shall be construed as co-extensive in meaning with lands, tenements and hereditaments, and as embracing chattels real. R. S. Ill. 1874, ch. 30, sections 20, 28, 30 and 38. These sections have been construed as authorizing the recording of assignments of mortgages, and it has been held that, unless the assignee of the notes procures and records an assignment of the mortgage, he will not be protected as against a subsequent grantee or mortgagee. *Ogle* v. *Turpin*, 102 Ill. 148.

The statutes of New York provide, and have for many years provided, for the recording of conveyances of real estate, and making them void as against subsequent purchasers unless recorded. It is declared by the statute that the term "conveyance" shall be construed to embrace every instrument in writing by which any estate or *interest* in real estate is created, aliened, mortgaged or *assigned*, or by which the title to any real estate may be affected in law or equity. Following these provisions is that providing that "The recording of an assignment of a mortgage shall not be deemed in itself notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them, to the mortgagee." 2 R. S. N. Y. 1875, p. 1151, section 76; *Id.*, p. 1138, *et seq.*

It will be noticed that section 7 of our statute, *supra*, is almost a literal copy of the section above set out. Our registry laws, as most of the western States, were doubtless modelled after the New York statutes, and hence none of them have a provision declaring in explicit terms that assignments of mortgages shall be recorded. That is provided for by the use of general terms, and the section declaring the effect of such an assignment.

In the case of *Ely* v. *Scofield*, 35 Barb. 330, the court, in speaking of the New York statutes, *supra*, said: "The term 'conveyance,' as used in the chapter referred to, shall be con-

strued to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity. * * * By section 41 of the same chapter, (p. 763), it is declared that the recording of an assignment of a mortgage shall not be deemed, in itself, notice of such assignment, to a mortgagor. * * * The references to the statutes embrace all the provisions thereof which can be claimed to bear upon the questions involved in the present case. * * * It was competent for the plaintiff to have put his assignment on record, and thus have protected himself against the satisfaction of the mortgage by Brockway. Such record would have been notice to all the world, excepting the mortgagor." The plaintiff here spoken of was the assignee of the notes from Brockway, the mortgagee. This case is fully sustained by many other New York cases. So far as I know, it has never been doubted, but many times approved and followed. See *VanKeuren* v. *Corkins*, 66 N. Y. 77; *Vanderkemp* v. *Shelton*, 11 Paige, 28; *Belden* v. *Meeker*, 2 Lansing, 470; *Belden* v. *Meeker*, 47 N. Y. 307; *Greene* v. *Warnick*, 64 N. Y. 220.

Under statutes similar to ours, and those above referred to, the Supreme Court of Texas in the case of *Henderson* v. *Pilgrim*, 22 Texas, 464, said: "Not to consume time, by referring to other cases, we think it is the obvious policy of our registry laws, to require all instruments concerning lands to be recorded in the proper county. (Hart. Dig., art. 2752 * *). We are of opinion, that an assignment of a mortgage is 'a lien affecting the title to land'—'a written contract in relation to land'—'an agreement'—'an instrument of writing of or concerning land,' within the meaning of our registry laws, such as ought to be recorded, to make it effectual against subsequent purchasers, for a valuable consideration, without notice." See again the Supreme Court of U. S., *supra*, under the statute of D. C.

It can not escape observation that our statutes, in force

when the release and mortgage were executed, were as explicit and comprehensive as those of any of the States above referred to, and more so than some of them. The adjudications upon those statutes are authority in the interpretation and construction of ours, and fully support the ruling in the case of *Ayers* v. *Hays*, *supra*.

If time and space would permit, the case could be further fortified by the decisions in the other States upon similar statutes. No case to the contrary has been cited, and I take no risk in asserting that a case can not be found under statutes like ours, which supports the principal opinion. It should be observed, too, that in each of the States above named it is held, as in this State, that a mortgage does not convey the legal title, but is of the same force and effect as in this State. In conclusion, I am for protecting the subsequent mortgagee in the case before us, by affirming the judgment of the court below.

Filed March 25, 1884.

No. 11,282.

JUSSEN ET AL. *v.* THE BOARD OF COMMISSIONERS OF LAKE COUNTY ET AL.

PRACTICE.—*Striking out Names of Defendants.*—*Error.*—There is no available error in overruling the plaintiff's motion to strike out the names of defendants, upon the alleged ground that they have no interest in the subject of the suit, for, in that event, their presence as parties could not prevent the plaintiff from obtaining such relief, as he might be entitled to, against the other defendants.

BOARD OF COMMISSIONERS.—*Special Session.*—*How and When Called.*—*Notice and Service.*—*Decision of County Auditor Final.*—Under sections 5737 and 5738, R. S. 1881, special sessions of boards of county commissioners may be called by the county auditor whenever the public interests require it; and the county auditor or other county officer named, in their order, must determine whether or not a special session is required by the public interests, and whether or not an emergency exists requiring a shorter notice of such special session than six days, and, if so, what notice shall be given, and how and by whom it shall be served; and

upon these points the decision of such auditor or other county officer is final, and can not thereafter be questioned, annulled, set aside, or held void and of no effect.

SAME.—*Railroad Aid.—Petition for Appropriation.*—Under the provisions of section 4045, R. S. 1881, a petition for an appropriation to aid in the construction of a railroad may be presented to the board of commissioners of the county, "at any regular or special session thereof."

RAILROAD.—*Petition for Appropriation.—Uncertainty or Ambiguity.*—The levy of a tax to aid in the construction of a railroad is not vitiated, nor will it be avoided, by any uncertainty or ambiguity in the language of the petition for the appropriation, when it appears that no one was or could be deceived thereby, and that the intention of the petitioners could not be misapprehended.

SAME.—*Sufficiency of Petition.—Subscription or Donation.*—The petitioners for an appropriation to aid in the construction of a railroad may designate, in their petition, whether the amount appropriated shall be donated to the railway company or invested in its capital stock, but their failure to make such designation will not vitiate the petition or any of the proceedings had thereon.

SAME.—*Consolidated Company.*—The fact that the petition asks an appropriation to a certain railway company, "or its successor by consolidation," does not invalidate the petition or the proceedings thereon; but in such case, in the event of consolidation, the right to the appropriation will pass to and vest in the consolidated company.

APPEAL.—*County Commissioners.—Trial de Novo.—Practice.—Supreme Court.*—An appeal from the orders of a county board levying a tax in aid of a railroad goes to the circuit court for a trial *de novo*, and not for the correction of errors; and the action of the court in striking out objections filed there, in the nature of errors assigned, affords no grounds for the reversal of the judgment by the Supreme Court.

From the Lake Circuit Court.

J. Kopelke, for appellants.

J. B. Peterson and *J. B. Cohrs*, for appellees.

HOWK, J.—The record of this cause shows that on the 19th day of April, 1881, a petition signed by more than twenty-five citizens and freeholders of Hobart township, in Lake county, was presented to the board of commissioners of such county, praying therein that an appropriation of ten thousand dollars might be made to aid the "New York and Chicago Railway Company" (or its successor by consolidation), a corporation duly organized under the laws of this State, to con-

struct its railroad in and through said Hobart township. Upon the presentation and submission of this petition the board of commissioners of Lake county then and there found that the petition was signed by more than twenty-five freeholders of Hobart township, that the said railway company was duly organized under the laws of this State, that the prayer of such petition ought to be granted, and that an election ought to be ordered and held in such township as prayed for in the petition. Thereupon, on the same day, the county board ordered that the polls be opened at the usual voting place in Hobart township for the purpose of taking the votes of the legal voters of such township, on May 30th, 1881, on the subject of such appropriation to said railway company, or its successor by consolidation, to aid in the construction of its proposed railway in and through Hobart township.

The election was held accordingly, and a proper canvass of the votes, subsequently had, showed a majority of twenty-eight votes in favor of such railroad appropriation. Thereafter, at the regular June session, 1882, of such board of commissioners of Lake county, when the board was about to take action on the aforesaid petition and the levy of the tax therein prayed for, thirty named persons and the Pittsburgh, Fort Wayne and Chicago Railroad Company, representing themselves to be taxpayers of Hobart township, appeared by their attorneys and filed their objections in writing to the levy of such tax. But the board of commissioners then and there overruled such written objections, and ordered that a tax of one per centum be levied on all the taxable property within such township, to aid the said railway company in the construction of its proposed railroad in and through Hobart township.

The transcript further shows that on the 5th day of July, 1882, an appeal bond was taken and approved by the auditor of Lake county, executed by Edmund Jussen, Valentine Behneke, Valentine Fabian, Louis Yoergler and Ernst Passon, with William Sholler as their surety, and payable to

the board of commissioners of Lake county, and the New York and Chicago Railway Company, and an appeal taken by the principals in such bond from the order of the county board to the circuit court of the county. Afterward, on the 7th day of July, 1882, the Pittsburgh, Ft. Wayne and Chicago Railway Company filed its appeal bond payable to the county board, to Hobart township, to the New York and Chicago Railway Company, and to each and all of the petitioners for such appropriation, and took an appeal from the order of the county board to the circuit court. In some manner, probably by the mistake of the clerk, these two appeals seen to have been erroneously docketed in the circuit court as one and the same cause. Section 5777, R. S. 1881.

Afterwards, at the April term, 1883, of the court below, the Pittsburgh, Ft. Wayne and Chicago Railway Company, by its counsel, dismissed its appeal. The effect of this dismissal was, of necessity, to dismiss from the record and from court all the defendants in the appeal of such railway company, *except* the board of commissioners of Lake county and the New York and Chicago Railway Company, who were also defendants in the appeal of Edmund Jussen *et al.* Thereafter, the defendants' written motion to strike out the objections in writing, filed by the appellants before the county board, to the levy of the tax voted for, was sustained by the court. Thereupon, the court rendered judgment against the appellants for the appellees' costs.

In this court, the first error assigned by appellants is the overruling of their motion to strike out the names of all the parties defendants from the docket and records in this cause, for the want of interest in the subject-matter thereof, except Hobart township. The only defendants named by the appellant, in their appeal from the order of the county board to the circuit court, were the board of commissioners of Lake county and the New York and Chicago Railway Company. The appellants did not make Hobart township a party defendant in their appeal. It is true that after they had taken

their appeal, a separate appeal was taken from the same order of the county board by the Pittsburgh, Ft. Wayne and Chicago Railway Company, in which latter appeal Hobart township and the petitioners for the levy of the tax were named as parties defendants, in addition to the county board and the New York and Chicago Railway Company. It is true, also, that the two appeals seem to have been docketed in the circuit court as one appeal, but they were never consolidated by any order of the court appearing in the record. When, therefore, the Pittsburgh, Ft. Wayne and Chicago Railway Company dismissed its appeal, of course, Hobart township and the other defendants therein, who were not defendants in the appellants' appeal, were dismissed from the docket and records of this cause. If the court had sustained the appellants' motion to strike out, they would have found themselves, after such dismissal, in the anomalous position of waging a lawsuit without any defendants thereto.

This court has often held that there is no available error in overruling a motion to strike out part of a pleading, for the reason that, at most, it can only leave surplusage in the record, which does not vitiate that which is good. *City of Crawfordsville* v. *Brundage*, 57 Ind. 262; *Doss* v. *Ditmars*, 70 Ind. 451; *Morris* v. *Stern*, 80 Ind. 227. So, also, it may be said that the error, if such it be, in overruling the plaintiffs' motion to strike out the names of defendants, upon the alleged ground that they have no interest in the subject of the suit, is at most a harmless error, for the reason that the presence of superfluous defendants in the suit can not prevent the plaintiff from obtaining such relief, as he is entitled to, against the other defendants.

The next error complained of is the sustaining of appellees' motion to strike out the objections and exceptions filed by the appellants, before the county board, to the levy of the tax. These objections and exceptions were twelve in number, and will be considered and passed upon in their enumerated order. It is first objected that the special session of the county

board, in April, 1881, at which the petition for the appropriation was presented by the freeholders of Hobart township, "was irregular and convened without any authority of law." This objection is itself objectionable, for the reason that it failed to point out wherein the special session was irregular, and without authority of law. Waiving this point, however, we learn from the brief of appellants' learned counsel that the special session of the county board was illegal, and its acts were consequently void, for the following reasons:

1. Because the members of the county board were served with written notices of the special session by the auditor in person, and not "by summons issued to and served by the sheriff;" and,

2. Because there was no emergency existing requiring the county board to meet in special session, upon shorter notice than "at least six days."

The statutory provisions in relation to special sessions of county boards have been in force, without change, since October 10th, 1863, and have often been the subject of judicial comment and construction. Sections 5737 to 5739, R. S. 1881. In *Wilson* v. *Board, etc.*, 68 Ind. 507, the proper construction of these statutory provisions was fairly presented for our consideration. After quoting the sections of the statute, the court there said:

"Under these provisions, it will be seen that the county auditor is clothed with the power to call 'special sessions' of the county board, whenever the public interests require it, of which special sessions at least six days' notice must be given, unless, in the opinion of the auditor, an emergency exists requiring a shorter notice, and in that case the auditor may fix the time at his discretion. It seems to us that the General Assembly of this State, in and by these statutory provisions, have committed to the county officers named in said act, and first to the county auditor, the discretionary right, power and duty to determine finally and conclusively, in each particular case, these three questions:

"1. Whether the public interests require a special session of the board of commissioners;

"2. Whether the facts of the particular case will authorize and justify the giving of at least six days' notice of such special session; and,

"3. If not, and in the opinion of such county auditor first, or other officer named in their order, an emergency shall exist requiring a shorter notice, what notice shall be given, and when such special session shall begin.

"When the county auditor, or other county officer acting as authorized by the provisions of the statute, shall have considered, passed upon and determined any or all of these three questions, we think that the decision of such auditor or other officer, in regard thereto, is and ought to be final; and that such decision can not thereafter be questioned, annulled, set aside or held void and of no effect. * * * * * Whatever notice the auditor, or other acting county officer, may give of such special session, and however and whenever such notice may be served, it seems to us that these matters become and are unimportant and immaterial, if, pursuant to such notice so served, the board of commissioners actually meet at the time indicated therein, in special session." And to the same effect, substantially, are the following cases: *Oliver* v. *Keightley*, 24 Ind. 514; *Board, etc.*, v. *Brown*, 28 Ind. 161.

The board of commissioners of Lake county was lawfully convened in special session on the 19th day of April, 1881; and the petitioners for the appropriation, finding the board thus in session, presented their petition, as they had the right to do. In section 4045, R. S. 1881, in force since March 8th, 1879, the presentation of such a petition to the board of commissioners of any county, "at any regular or special session thereof," is expressly authorized, and no previous notice is required to be given of the time or term at which such petition will be presented. This is the point of difference between such cases as the one in hand and that of *City of Vincennes* v. *Windman*, 72 Ind. 218, which is cited and relied upon

by appellants' counsel. The proceedings in the case cited were governed by statutory provisions widely different from those under which the proceedings in this case were had; so much so that the doctrine of the former case can not be regarded as at all applicable to the case we are now considering.

The *second* written objection of the appellants is that "the petition is irregular, insufficient and not in accordance with the laws of the State." This objection is too defective for any purpose, or to present any question for decision.

The *third* objection is as follows: "The said petition is irregular, defective and insufficient, in this, that it does not ask the township to make the appropriation, nor that the said sum of money be raised by taxation on the taxable property of said township, as by law required, but it asks that the board of commissioners shall appropriate said sum of money for the purpose aforesaid."

In *Wilson* v. *Board, etc., supra*, the sufficiency of the petition was objected to because it did not ask the county board to appropriate any sum of money to aid in the construction of the railroad through the township. The court said: "The petition is loosely worded, and was not drawn with legal accuracy and precision; but it seems to us that the object and purpose of the petitioners could not be misunderstood by any one, and certainly were not misunderstood by the county board, as is clearly shown by the record of their proceedings on said petition." In *Scott* v. *Hansheer*, 94 Ind. 1, the objections to the petition were substantially the same as the appellants' *third* objection in this case; and it was held that the petition should be liberally construed, and where its prayer was for an appropriation by the county board, instead of by the township, it would still be good as such prayer could not mislead the voters. To the same effect are the cases of *Goddard* v. *Stockman*, 74 Ind. 400, *Bish* v. *Stout*, 77 Ind. 255, and *Hilton* v. *Mason*, 92 Ind. 157. Appellants' *third* objection to the appropriation in this case, therefore, is not well taken.

Their *fourth* objection is that "the petition does not state whether the money, so to be appropriated, shall be donated to, or invested in, the capital stock of the railway company." There is nothing, we think, in this objection. Doubtless, the petitioners were at liberty to designate, if they chose so to do, whether the amount of the appropriation prayed for should be donated to the railway company, or invested in its capital stock; but their failure to make such designation would not vitiate the petition, or any of the proceedings had thereon. *Petty* v. *Myers*, 49 Ind. 1; *Bittinger* v. *Bell*, 65 Ind. 445; *Faris* v. *Reynolds*, 70 Ind. 359.

Appellants' *fifth* objection is as follows: "The petition is irregular in this, that it asks that the sum of money be appropriated to the New York and Chicago Railway Company, 'or its successor by consolidation,' and in that it does not name such successor or successors, and does not set forth that such successor or successors are duly organized as a company, or companies, under the laws of the State of Indiana."

This objection is not well taken. In *Faris* v. *Reynolds*, *supra*, the petition asked that the appropriation be paid to the railroad company, "or assigns," and it was claimed on this ground that the petition was void and the tax illegal; but it was held that the petition was not thereby invalidated. The court said: "It is not seen that any one is injured by the assignment of the claim. * * * * If the assignment is valid, the taxpayer is not injured. If it is invalid, it harms no one, and furnishes no reason why the tax should not be collected. There is no foundation in these objections." So, in the case at bar, what possible difference can it make to the objectors whether the appropriation be paid to the New York and Chicago Railway Company, or to its successor by consolidation? Or, how are the objectors injured by the failure of the petitioners to name the successor of such railway company, when, as yet, it had no successor by consolidation, and the successor had no name? Or, how could it possibly have aided the objectors, in this lawsuit or otherwise, if the peti-

tioners had kindly informed them whether or not such successor or successors, which had not as yet been created, were duly organized under the laws of this State? It seems to us that this *fifth* objection of the appellants had no foundation in the facts shown by the record, and, certainly, it had none in law.

For their *sixth* objection the appellants say: "The petition is irregular in this, that it asks for an appropriation in aid of more than one railway company." This objection is not shown to be true in fact by the petition appearing in the record, and, therefore, there is nothing in the objection.

The *seventh* objection is as follows: "The New York and Chicago Railway Company is extinct and no longer in existence, and its track in Hobart township is now owned and operated by the New York, Chicago and St. Louis Railway Company, and these facts existed when the pretended aid tax was voted."

The facts stated by the appellants in this *seventh* objection, if facts they be, are not shown to be true by any matter appearing in the record. Nor is it shown how or by what process the New York and Chicago Railway Company became "extinct and no longer in existence"; nor is it shown in what manner, or by what means, its track was then owned and operated by the New York, Chicago and St. Louis Railway Company; nor does the record show that these alleged facts existed when the aid tax was voted. In *Logan* v. *Vernon, etc., R. R. Co.*, 90 Ind. 552, it was held by this court that a railway company does not become "extinct and no longer in existence," by reason of its failure to perform any of its functions, but, before it can be said that such company is extinct and no longer exists, there must be a judicial declaration of the forfeiture of its corporate rights, privileges and franchises, in a suit instituted for that purpose by and in the name of the State. It is not pretended or claimed by the appellants in this case, that the New York and Chicago Railway Company has ceased to exist by reason of any forfeiture, judicially declared or other-

wise, of its corporate rights, privileges and franchises. We learn from the brief of their counsel, that the appellants claim that the New York and Chicago Railway Company became extinct and no longer in existence by reason of its consolidation with some other railroad company, thus creating a new railroad corporation under the corporate name of the New York, Chicago and St. Louis Railway Company. Under our statute providing for the consolidation of railroad companies (section 3971, R. S. 1881), the consolidation is the result of contract between such companies; and the question as to whether or not either or both of the original companies, by reason of the consolidation, became extinct or ceased to exist, must depend very largely, if not entirely, upon the terms of the contract of consolidation mutually agreed upon in each particular case.

The question is of no practical importance, however, in the case at bar; for here the record shows that all the proceedings were had in anticipation of consolidation, and, in the event of its consummation, in aid of the consolidated company. In *Paine* v. *Lake Erie, etc., R. R. Co.*, 31 Ind. 283, it was held that a railroad company, formed by the consolidation of two companies, succeeds to all the rights of each of the corporations of which it is composed. And, in the recent case of *Scott* v. *Hansheer*, *supra*, it was held that where an appropriation had been lawfully made by a township in aid of a railroad company, it acquired such a right to and interest in the appropriation as would, upon its consolidation with another railroad corporation, pass to and vest in the consolidated company. In any view of the *seventh* objection, therefore, we think it was not well taken.

The remaining objections of the appellants are all united as a single objection in the brief of their counsel, as follows: "Our last objection to the validity of the tax is that the notice of the election differs from the prayer of the petition and the order of the board of commissioners thereon; that, again,

the order of the board levying the tax differs from the matters voted upon by the voters of Hobart township, as shown by the notice, and that, therefore, the proceedings are void."

The petition for the appropriation substantially complied with the requirements of the statute; the qualified voters of Hobart township were duly notified, pursuant to the statute, that the polls would be opened to take their votes on the subject of such appropriation; the election was held in conformity with law, resulting in a majority in favor of the appropriation; and the county board made the proper order for the levy of the tax, as prayed for. The record of this cause fails to show any material or substantial defect or error in any of the proceedings of the county officers, or before the county board. The appellants' objections were all purely technical, without foundation in law or fact, and did not reach or affect the merits of the cause. In *Gavin* v. *Board, etc.*, 81 Ind. 480, it was held by this court that an appeal from the order of a county board, for levying a tax in aid of a railroad, goes to the circuit court not for the correction of errors, but for trial as an original cause; and that objections there filed, in the nature of errors assigned, should be wholly disregarded, and the appellant can make no question, in this court, concerning the ruling of the circuit court on such objections.

We are of opinion, therefore, in the case in hand, that the decision of the circuit court, in striking out the appellants' written objections to the proceedings before the county board, is not an available error for the reversal of the judgment. We have now considered and decided all the questions presented and discussed by the counsel of the appellants, and our conclusion is that there is no error in the record of which they can complain.

But, before leaving the case, we deem it our duty to direct the attention of the appellees to the imperfect condition of their judgment in the circuit court, which was only for costs. In *Gavin* v. *Board, etc.*, *supra*, a similar case to the one at

bar, the court said: "The statute under which this cause was appealed from the commissioners, required that the circuit court should make a final determination of the matters in controversy, and either carry such final determination into execution, or remand the cause with instructions to the commissioners." Section 5778, R. S. 1881; 1 R. S. 1876, p. 357, section 37; *Mandlove* v. *Pavy*, 33 Ind. 505. "The judgment in this case made no order concerning the levy of taxes appealed from, and hence did not make a complete final disposition of the cause; but as no material error was committed against the appellant during the progress of the cause, he is not in a position to demand a reversal of the judgment, however defective in some respects it may be."

The judgment is affirmed, with costs.

Filed May 27, 1884.

No. 11,510.

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137 142
138 614

The Board of Commissioners of Gibson County *v.* Emmerson et al.

County Commissioners.—*Claim Against County.*—*Pleading.*—In an action against a board of county commissioners, originating before the board itself, the complaint, both before the board and in the circuit court on appeal, need only contain a succinct and detailed statement of the claim.

Same.—*Liability.*—*Unsafe Bridges.*—*Negligence.*—The act of March 2d, 1883, "concerning highways and supervisors thereof," Acts 1883, p. 62, does not relieve boards of county commissioners of any responsibility formerly devolving upon them in regard to unsafe or defective bridges.

From the Gibson Circuit Court.

L. C. Embree, for appellant.

T. R. Paxton, for appellees.

Niblack, J.—During the year 1876, the board of commissioners of the county of Gibson caused a wooden bridge to be constructed across Pigeon Creek, at a point where a public highway of that county crossed that stream, and the bridge

so constructed was thereafter continuously used in connection with, and as a part of, the highway, until it broke down as hereinafter stated.

Its middle or main span was near forty feet in length, and a similar bridge could not now be constructed for probably less than $300.

On the 10th day of July, 1883, Garrett M. Emmerson and Zachary T. Emmerson were the owners of a portable steam engine, used in threshing wheat, and capable of being drawn from place to place like a wagon.

On that day the Emmersons, who are the appellees here, were, with the assistance of two mules and two horses, engaged in transporting their engine along the highway and across the bridge herein above named. When the persons in charge of the engine approached the bridge, they saw nothing unusual in its appearance, and drove upon it for the purpose of passing over it. While upon the middle or main span the bridge gave way and precipitated the engine into the bed of the stream below, carrying the mules with it. The engine was very seriously injured, and the mules were only rescued by cutting their harness to pieces and thus detaching them from the engine.

The Emmersons soon afterwards filed a claim before the board of commissioners of Gibson county for the damages resulting to them from the falling of the bridge, but that tribunal refused to allow the claim, or any part of it. Whereupon they appealed to the circuit court, where they filed an amended and more formal complaint, in two paragraphs, to both of which demurrers were overruled. A trial resulted in a verdict in favor of the Emmersons, assessing their damages at $185, and, over a motion for a new trial, they had judgment on the verdict.

The board of commissioners, appealing, first questions the sufficiency of the complaint. But, in proceedings like this, very little formality in pleading is required, and it is but seldom that any material question arises upon the pleadings. *Board*,

etc., v. *Adams*, 76 Ind. 504; *Board, etc.*, v. *Armstrong*, 91 Ind. 528.

Both paragraphs of the complaint contained a succinct and detailed statement of an apparently reasonable claim against the county, and that was all that is necessary in any case commenced before a board of county commissioners. *Board, etc.*, v. *Loeb*, 68 Ind. 29; *Board, etc.*, v. *Gillum*, 92 Ind. 511.

The circuit court instructed the jury as follows:

"In this case, Gentlemen, if the plaintiffs have proven that the bridge in question was on a public highway of Gibson county, Indiana, that it had been built by the defendant, the Board of Commissioners of Gibson county, that the board negligently suffered the bridge to be out of repair, whereby the plaintiffs, in the ordinary use of the bridge, were injured in their property described in the complaint, without any fault on the part of the plaintiffs, in that view of the case the plaintiffs would be entitled to a verdict for whatever sum the evidence shows their property was damaged by reason of such defect. The county is not an insurer of all bridges in the county, but upon the subject of the alleged negligence the material inquiry is whether the bridge in point of fact was, at the time of the alleged injury and immediately before, out of repair, and whether the defendant, the board, under all the circumstances shown, was guilty of negligence in permitting the bridge to become and remain out of repair. If the defendant was not negligent in permitting the bridge to be out of repair, in that view of the case your verdict should be for the defendant. If the proof shows that the bridge was out of repair at and immediately before the alleged injury, and the defendant was negligent in permitting the bridge to be out of repair, and if you should further believe from the evidence that the agents of the plaintiffs were negligent in driving across the bridge, which contributed to the injury, in that view of the case your verdict should be for the defendant."

Counsel for the appellant concedes that this instruction stated the law as it existed previous to March 2d, 1883, cor-

rectly, but insists, with much earnestness and apparent confidence, that the act of that date, concerning highways (Acts 1883, p. 62), has so changed the relations of the board of county commissioners to the bridges within their respective counties as to render the instruction erroneous in its application to the facts of this case.

It is true that the act in question contains some new provisions on the subject of highways and bridges, but, in our opinion, these new provisions are neither so material nor so radical as counsel seeks to maintain them to be. It provides in section 5 that the supervisor of roads "shall carry into effect all orders of the trustee of the township in which the road district is situated, touching the highways and bridges therein, and keep the same in good repair." Sections 18 and 19, when construed together, probably require the supervisor, under the order of the township trustee, to construct all bridges and culverts within his road district which cost less than $50. Section 20 extends the road tax limit forty cents on each $100 of property, instead of twenty-five cents as formerly. But these provisions are merely auxiliary to the general power of county boards over roads and bridges, and do not relieve these boards of any responsibility which formerly devolved upon them on account of defective or unsafe bridges.

Section 11 of the act of March 3d, 1855, concerning the erection and repair of bridges (1 R. S. 1876, p. 239), provide that the boards of commissioners of the respective counties shall cause all bridges to be kept in repair, and that implied that such commissioners should adopt all measures reasonably necessary for that purpose. That section was continued in force as section 2892, R. S. 1881, and has not been superseded by any of the merely supplemental provisions of the act of March 2d, 1883, *supra*. The boards of commissioners still have general supervision over the bridges of their respective counties, and when either a township trustee or a supervisor omits to give a bridge within his territory proper

attention, it is the duty of these boards to cause the omission to be supplied without unreasonable delay. As was said in the case of *House* v. *Board, etc.*, 60 Ind. 580 (28 Am. R. 657), suitable means have been provided to enable county boards to discharge this, and all kindred duties, concerning bridges under their charge. See, also, the cases of *Board, etc.*, v. *Deprez*, 87 Ind. 509; *Board, etc.*, v. *Brown*, 89 Ind. 48; *Board, etc.*, v. *Legg*, 93 Ind. 523.

In our estimation, therefore, the objection made to the instruction given by the circuit court can not be sustained.

It is, also, insisted that the damages are excessive, but there was evidence of a general character, independently of some itemized statements submitted, which tended very fully to sustain the verdict in respect to the amount of damages allowed by it. This precludes us from entering upon an analysis of the evidence having relation to the question of the damages.

Reference has been made in argument to some interrogatories, with answers attached, which were returned by the jury with their verdict, but there is nothing in the record showing that these interrogatories were submitted to the jury by the court, or which gives the slightest intimation as to the manner in which they came into the possession of the jury. Under such circumstances, no question is presented by the answers to these interrogatories. *Cleveland, etc., R. W. Co.* v. *Bowen*, 70 Ind. 478; *Astley* v. *Capron*, 89 Ind. 167.

The judgment is affirmed, with costs.

Filed May 27, 1884.

No. 11,540.

Epperson *v.* Hostetter, Administrator.

Decedents' Estates.—*Payment.*—*Pleading.*—A general plea of payment to a claim against an estate, without stating time, is good on demurrer.

Same.—*Statute of Limitations.*—To a claim upon an account against an intestate's estate, a plea, that the cause of action did not accrue within six years before bringing the action, is bad.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

T. E. Ballard and *M. E. Clodfelter*, for appellee.

ZOLLARS, J.—Appellant is the widow of William Epperson, deceased. She filed a claim against his estate, claiming $2,495. This claim was allowed by the administrator, David H. Hostetter. Upon a proper showing by appellees, Willis F. Epperson, Susan F. Brown and Samuel Brown, the claim was transferred to the issue docket, and they, as creditors, were allowed to file answers and defend against the claim. They based their application upon section 2326, R. S. 1881.

Not having been allowed the full amount claimed, appellant has appealed, and assigns as error the overruling of her demurrer to the second and third answers, and the overruling of her motion for a new trial.

The second answer is a plea of payment. The time of payment is not stated, except that it was before the filing of the claim. This is sufficient as against a demurrer. If appellant wished, and was entitled to have the time more specifically stated, her proper course was by a motion to have the plea made more certain.

The answer was by all of the defendants. The naming of one of them as William F. Epperson, instead of Willis F. Epperson, was a mere clerical mistake, which neither affected the validity of the plea nor the substantial rights of the parties.

The overruling of the demurrer to the third answer was error. This answer is, that appellant's cause of action did not accrue within six years before the bringing of the action. Ordinarily, the six years' limitation is a bar to an action upon an account, such as that set out in appellant's complaint. Section 298, R. S. 1881, however, provides that "If any person entitled to bring, or liable to any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may

be brought at any time after the expiration of the time limited, within eighteen months after the death of such person."

The effect of this statute is to extend the limitation in case of the death of either party. A case may, therefore, occur in which, by the death of either party, just before the expiration of the six years, the limitation may be extended to near seven and one-half years, instead of six. *Knippenberg* v. *Morris*, 80 Ind. 540; *Harris* v. *Rice*, 66 Ind. 267.

We do not think that this is a case in which the plaintiff should be called upon to plead the exception to the statute. It was so held in the above case of *Knippenberg* v. *Morris*, *supra*. The rule in this State is that a demurrer will not be sustained to a complaint on the ground that it shows a cause barred by the statute of limitations, unless it also appears that the cause does not come within any of the exceptions to the statute, where there are such exceptions. *Kent* v. *Parks*, 67 Ind. 53; *McCallam* v. *Pleasants*, 67 Ind. 542; *Biggs* v. *McCarty*, 86 Ind. 352 (44 Am. R. 320); *Lucas* v. *Labertue*, 88 Ind. 277.

The reason of this rule has been variously stated. In the case of *Hanna* v. *Jeffersonville, etc., R. R. Co.*, 32 Ind. 113, it was said: "The reason for this is, that usually there are exceptions to statutes of limitations, and the plaintiff should, therefore, have the opportunity of replying to the plea, so that he may show that the case is within any of the exceptions. To compel him to make these averments in the complaint, would tend to inconvenient and needless prolixity."

In the case of *Potter* v. *Smith*, 36 Ind. 231, it was said: "The reason is, that the case may be within some of the exceptions, and the plaintiff is not bound to anticipate the defence of the statute and show his case to be within the exception without knowing that such defence will be made. Upon the statute being pleaded, he may reply the exception." Perhaps the more logical reason of the rule is that as there are exceptions to the statute, the court can not say as a matter of law, upon the demurrer, that the action is

barred, unless it is made to appear affirmatively that the case is not within some of the exceptions. In such cases the holding has been that the statute must be pleaded by answer. In some of the above cases it was said that when the statute is thus pleaded, the plaintiff must reply the exceptions in the statute.

Where neither the complaint nor answer develops the fact that the case is within any of the exceptions, it is but reasonable to require the plaintiff to show that fact by a reply, if he seeks protection by reason of it. In such case, the reply is necessary to furnish to the court the requisite information.

Where, however, this fact is developed by the complaint and answer, or either of them, there can be no reason for showing it by a reply. And where the complaint shows that the case is within some of the exceptions to the statute, it will not only be good against a demurrer, but an answer setting up the statute, simply, will be insufficient. That the case is within some of the exceptions may be shown by the averments in the complaint, or the nature of the case may be such that the court will take judicial notice of that fact.

In the case of *Perkins* v. *Rogers*, 35 Ind. 124 (9 Am. R. 639), it was insisted that the court below erred in overruling a demurrer to the complaint, because it affirmatively appeared on the face of it that the cause of action had not accrued within six years next preceding the commencement of the action. The parties were residents, respectively, of the States of Indiana and Louisiana. It was held that the court would take judicial notice that from the 16th day of August, 1861, until the 20th day of August, 1865, a state of war existed between the States, and that during that time the operation of the statute of limitations was suspended. Such a state of war was not averred in the complaint, but the judicial notice was made to serve the purpose of such averment, and the complaint was held sufficient.

In the case before us, the court knows from the averments

in the complaint, and the nature of the case, that the party who contracted the debt to appellant is dead, because the claim is presented against his estate. The court, therefore, knows that the case falls within the exception to the statute, and is not barred absolutely by the six years' limitation, and that by the death of the party the time may have been extended. The answer, therefore, that the cause of action did not accrue within six years before the commencement of the action is not a sufficient answer. The demurrer admitted the truth of the answer, but, when admitted, it did not show the action to be barred.

An answer in such case, to be sufficient, must state such facts that the court can say upon them, as a matter of law, that the action is barred by the statute of limitations applicable.

We are to inquire, then, whether the error is such an one as requires us to reverse the judgment.

In cases of this character, the administrator may avail himself of the statute of limitations without specially pleading it. *Zeller* v. *Griffith*, 89 Ind. 80. So might the creditors in this case, as, for the purposes of this litigation, they occupy the place of the administrator.

The rule is settled, too, that the sustaining of a demurrer to a good paragraph of an answer will be a harmless error, if the defendant has another paragraph under which the same matters are admissible in evidence. *Fuller* v. *Wright*, 59 Ind. 333; *Martin* v. *Merritt*, 57 Ind. 34 (26 Am. R. 45); *Board, etc.*, v. *Jameson*, 86 Ind. 154; Works Pr., section 537, and cases cited. This, however, is not the case before us. Here a demurrer was overruled to a bad paragraph of answer. In such case it has been held that the error may not be harmless, although there are other paragraphs of answer under which the same facts are admissible in evidence. *Over* v. *Shannon*, 75 Ind. 352; *Sims* v. *City of Frankfort*, 79 Ind. 446.

Appellant's claim is based upon a loan of money to the decedent. Her evidence shows that a part of it was loaned more than six years prior to the bringing of this action. In

one of the instructions, as modified, the court charged the jury that she was entitled to recover the amount proven, unless one of the affirmative defences was proven. One of the affirmative defences is the third answer, which, as we have seen, sets up that the cause of action did not accrue within six years preceding the bringing of the action. The jury returned a verdict for much less than the amount claimed. In view of these facts, we can not say that the error in overruling the demurrer to the third answer was a harmless error. For aught that we can know, the jury may have disallowed that portion of the claim which accrued prior to the six years preceding the action.

It is true that by the second instruction the jury were correctly charged as to the statute of limitations, but this did not cure the error. The instructions can not be reconciled with each other. They were thus calculated to confuse and mislead the jury, or at least to leave them in doubt and uncertainty as to what was the law applicable to the case. For the errors in overruling the demurrer, and in giving the first instruction as modified, the judgment must be reversed. It will not be necessary, therefore, to notice the other questions discussed by counsel. We may say, however, that as at present advised we see no valid objections to the introduction in evidence of appellant's reports as guardian of her children.

The judgment is reversed with costs.

Filed May 27, 1884.

No. 10,724.

Connecticut Mutual Life Insurance Company *v.* Stewart et al.

Voluntary Payment.—*Protest.*—*Redemption of Real Estate from Sheriff's Sale.*—In an action to enforce a mechanic's lien on real estate, the plaintiff recovered, and it was adjudged that a certain prior mortgage on the real estate, the mortgagee being a party and defaulted, was junior and subordinate to such lien. The property was purchased under the

judgment by the judgment plaintiff. In a suit to review the judgment, brought by the mortgagee, judgment was rendered against him, from which he appealed. The year for redemption from the sale being about to expire, and the mortgagor being insolvent, the mortgagee paid the redemption money to the clerk of the court for the purchaser, who received it from the clerk. At the time of the payment, the mortgagee notified the purchaser of the purpose of the former to prosecute an appeal, and filed with the clerk a written protest, reserving therein the right to recover the redemption money if the judgment appealed from should be reversed. After the expiration of the year for redemption the mortgagee through his appeal obtained such a reversal; afterwards the first named judgment was adjudged void as to the mortgagee. Thereafter, the mortgagee, having foreclosed his mortgage and having purchased the property and taken possession thereof under such foreclosure, demanded repayment of the redemption money from the purchaser who had so received it from the clerk.

Held, that the payment was voluntary, and that the money so paid for redemption could not be recovered.

From the Superior Court of Marion County.

W. D. Bynum, *A. T. Beck*, *T. L. Sullivan* and *A. Q. Jones*, for appellants.

J. S. Tarkington and *J. M. Judah*, for appellees.

BLACK, C.—The appellant's complaint against the appellees was held bad on demurrer, for want of sufficient facts.

The complaint showed, in substance, that, in 1875, one John R. Haynes, being the owner of certain real estate in Indianapolis, executed to the appellant a mortgage thereon, to secure the payment of a note for the sum of $2,000, payable in five years, and coupon notes for semi-annual instalments of interest on said sum, said notes being made by said Haynes to the appellant, and said mortgage being duly recorded in the month in which it was executed; that in 1876 and 1877, the appellees brought actions in the court below against said Haynes for the enforcement of mechanics' liens against said real estate; that said actions were consolidated and tried, and a decree was rendered in favor of the plaintiffs therein, and the sums found and adjudged in their favor were decreed to be liens on said real estate, which was ordered to be sold for

the payment thereof; that the appellant was made a party defendant in some of said actions, and did not appear, but was defaulted, and it was decreed that the appellant had no right or interest in or to said real estate except such as was junior and subordinate to said liens of the appellees; that under said decree said real estate was sold by the sheriff on the 24th of November, 1877, and was purchased by the appellees for the amount due as principal, interest and costs, upon said decree, and a certificate of said sale was issued by the sheriff to the appellees; that on the 26th of October, 1878, the appellant filed in said court a complaint for the review of said decree, to which complaint the appellees demurred, and on the 23d of November, 1878, said demurrer was sustained by said court in special term, and judgment upon said demurrer was rendered; that the appellant appealed therefrom to said court in general term, where, on the 5th of May, 1879, the judgment in special term was reversed, and the cause was remanded to the special term, with direction to overrule said demurrer; that in special term said court overruled said demurrer, and said decree was adjudged void as to the appellant; that after the court in special term had sustained the demurrer to said complaint for review as aforesaid, which it did the next day before the last day of the year for redemption from the sale aforesaid, said Haynes being insolvent, the appellant paid to the clerk of said court the amount necessary to redeem from said sale; that at and before the making of said payment, the appellant notified the appellees that the appellant intended to prosecute its appeal in said suit for review, and filed with the clerk a written protest, reserving therein the right to sue for the recovery of the money so paid, if the judgment of the court in special term should be reversed; that the appellees received from the clerk the amount so paid, which they refused to repay, though payment had been demanded; that said mortgage was never paid, and the appellant foreclosed it and was in possession of said real estate under sale on foreclosure; that the appellees did not have any lien, when they procured

their said decree, and the pretended liens claimed by them were void, because notice thereof had not been filed, as required by law, within sixty days from the time of furnishing materials and performing labor, and because the appellees had been fully paid for the materials and labor furnished by them. Prayer for the recovery of the amount so paid by the appellant to the clerk.

We think that the payment made by the appellant for the redemption of the real estate must be regarded as a voluntary payment. In *Railroad Co.* v. *Comm'rs*, 98 U. S. 541, the following was approved as a correct statement of the common law:

"Where a party pays an illegal demand with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and can not be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

In *Crosier* v. *Acer*, 7 Paige, 137, it was said, that if a court of equity "can relieve against a mistake in law in any case where the defendant has been guilty of no fraud or unfair practice, which is at least very doubtful, it must be in a case in which the defendant has in reality lost nothing whatever by the mistake, and where the parties can be restored to the same situation, substantially, in which they were at the time the mistake happened."

The appellant paid the redemption money with full knowledge of the facts, without any demand or request, and in the assertion of a right for its own benefit. A protest accompanying payment can not constitute proof of immediate and urgent necessity for payment, and can be of avail only when the constraint is otherwise shown, and then merely as evidence of want of acquiescence.

The appellant's so-called protest merely indicated a purpose on the part of the appellant to inform the appellees that in a certain event the appellant would claim repayment of the money which it then elected to pay for the purpose of acquiring advantage thereby. The payment was not made under a mistaken supposition that the law required it. The court in special term had adjudged in favor of the appellees upon their demurrer. This determination remained in force when the appellant, with knowledge thereof and with the avowed purpose of seeking a different determination upon appeal, made the payment.

At the time of the payment, neither the appellees nor the appellant had possession of the real estate. If the appellant had not redeemed, the appellees would have been entitled to a sheriff's deed and to the immediate possession of the real estate, and to retain it until the appellant should acquire title under foreclosure of its mortgage. The appellees would have had also a valid demand against Haynes for rent for the year of redemption following the sale to the appellees. By the redemption the appellant put it out of the power of the appellees to obtain a deed and the possession of the real estate thereunder, and deprived them of a right to recover judgment against Haynes for the reasonable rents and profits of the year of redemption, and the appellant acquired a lien on the premises for the redemption money, and could take its own time to foreclose its mortgage, which it appears to have done. Whether in its foreclosure it enforced its lien for the redemption money, or what was the value of the property obtained by the appellant under its foreclosure sale, is not shown.

It is not pretended that the judgment of the appellees as against Haynes was attacked by the appellant or affected by its proceeding for review. When the appellant demanded repayment after procurement of an adjudication in special term that the appellees had acquired no priority over the appellant, all right of redemption by the appellees from the appellant would have been lost if they had repaid the money

so demanded, unless they could thereby be remitted to a relation which would entitle them to become redemptioners, and the year after the appellant's foreclosure sale was not then expired. The date of that sale is not stated, and the date of the demand for repayment is not given. This action was commenced in December, 1881.

The appellees, retaining the redemption money, to the payment of which by the appellant they could not object, were not merely cut off from the right to sue an insolvent person for rents and profits, but they were also deprived of other valuable rights. Besides the fact that, if it be possible to place the appellees *in statu quo*, no offer of restoration has been made, we think it is plain that the appellees could conscientiously receive and retain the money paid to the clerk for their use.

The appellant waited until about one month before the expiration of the year for redemption before it commenced its suit for review, and, after the adverse decision therein of the court in special term, the appellant, in the exercise of its own judgment, redeemed, though, as the event of its appeal showed, there was no absolute need of redeeming in order to enforce its mortgage as prior to the liens of the appellees. It succeeded in obtaining a reversal of the judgment of the court, but it can not reverse its own judgment. It paid under its own claim of right to do so, and the appellees suffered the redemption of the real estate which they could not prevent. We think that the complaint does not show that they should be required to repay the redemption money.

PER CURIAM.—Upon the foregoing opinion it is ordered that the judgment be affirmed at the appellant's costs.

Filed May 29, 1884. Petition for a rehearing overruled June 21, 1884.

No. 11,136.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY *v.* JACKSON.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not award a new trial on the mere weight of the evidence.

From the Hendricks Circuit Court.

J. G. Williams, for appellant.

J. V. Hadley, *E. G. Hogate* and *R. B. Blake*, for appellee.

BEST, C.—This action was brought by the appellee to recover the price of a mare alleged to have been killed by the appellant at a point upon its road where the same was not securely fenced.

Issue; trial; verdict, and judgment for $115. A motion for a new trial, on the ground that the verdict was not sustained by sufficient evidence, was overruled, and this ruling alone is urged as error.

The only disputed question of fact was whether the appellant's train of cars actually collided with the appellee's mare. The appellant insists that the mare, after going upon its right of way, became frightened, possibly at an approaching train, ran along its track, fell upon a pile of ties and so injured herself as to cause her death. This theory is fairly supported by the evidence. The appellee insists that the mare was running in advance of an approaching train, was struck and knocked upon the pile of ties and thus injured. This theory is not without its support in the evidence. No one saw the injury inflicted, and the manner in which it was done can only be determined by certain physical appearances. The footprints of the mare indicate that she was running west on the south side of the track near the end of the ties, and that she continued to run in this direction until within twelve feet of a pile of ties near the south side of the track. Hair was found upon this pile of ties and upon the ends of the

ties under the rail immediately opposite, and from these foot-prints lead to where the mare was found standing the next morning. The principal wound was upon her left side, though some scratches were found upon the right side. The mare was, with difficulty, led a short distance to the appellee's barn where she lived for a couple of days. After her death the appellant's section foreman, whose duty it was to examine all stock killed upon his portion of the track, examined this mare and reported her killed by the cars, though he in fact knew nothing about it other than what the appearances indicated. The fact that the mare was so slightly injured upon the right side, and the scratches thereon may have been caused by the mare falling upon the end of the ties, or rolling upon them after falling upon the pile of ties, indicate strongly that her injuries were not caused by a collision with the train. On the other hand, the fact that the last foot-prints were at least twelve feet from the pile of ties upon which she was injured, and that she was diverging from them, indicate that she was driven upon them, not alone by the momentum of her body, but by the force of the train, and these, coupled with such admission as results from the section foreman's report, justify the conclusion that the mare was struck and injured by the cars. The evidence, it is true, is slight, but it can not be said that there was no evidence of a collision, and under these circumstances we can not disturb the verdict upon the mere weight of the evidence. This is the established rule of this court. *Webb* v. *Zeller*, 90 Ind. 445; *City of Indianapolis* v. *Murphy*, 91 Ind. 382.

The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed May 29, 1884.

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No. 11,034.

STRICKLER *v.* GREER.

MALICIOUS PROSECUTION.—*Malice.*—Without proof of malice, an action for malicious prosecution can not be maintained, nor does the law infer malice from the want of probable cause.

From the Shelby Circuit Court.

O. J. Glessner, E. K. Adams and *L. J. Hackney,* for appellant.

J. B. McFadden, for appellee.

HAMMOND, J.—Action by the appellee against the appellant for malicious prosecution in causing the appellee's arrest upon a *capias ad respondendum,* in an action before a justice of the peace. The appellant answered by the general denial. Trial by jury; verdict for the appellee; judgment on the verdict, over the appellant's motion for a new trial and exceptions.

The evidence shows that in the action before the justice the appellant filed his complaint against the appellee upon items of account amounting to $25.75, and also filed an affidavit to the effect that the claim was just, due, legal and unpaid, and that the appellee was about to leave the county, taking with him property subject to execution, or other means by which said claim might be paid in whole or in part, with the intent to defraud or delay his creditors. The justice issued a *capias ad respondendum,* upon which the appellee was arrested. The docket entries of the justice show that the parties appeared and compromised, by a son of the appellee paying the appellant $14.50, and the appellant paying costs. At the time of the commencement of the action before the justice, the appellee had sold his property and was about changing his residence to another county. One of the contentions in the present case was whether in such removal the appellee intended to defraud or delay his creditors. The court upon this question gave the jury the following instruction:

"1. By the Constitution, it is provided that there shall be no imprisonment for debt except for fraud. A *capias ad re-*

spondendum requires the arrest of the party, which is imprisonment. It follows, therefore, that a case of fraud must be established to justify such writ. If you believe, therefore, from the evidence, that the defendant, Strickler, had not a reasonable or probable cause to believe that plaintiff was about to leave the county, taking with him property subject to execution, or other means with which defendant's claim might be paid in whole or in part, with intent to defraud or delay his creditors, then you must find for plaintiff."

The law is well settled that to sustain an action for malicious prosecution the plaintiff must prove that the legal proceedings complained of were instituted by the defendant maliciously and without probable cause. *Wilkinson* v. *Arnold*, 11 Ind. 45; *Ammerman* v. *Crosby*, 26 Ind. 451; *Seeger* v. *Pfeifer*, 35 Ind. 13.

Malice is not a legal inference from want of probable cause. It may be, but is not necessarily, inferred as a matter of fact from the want of probable cause. The question of malice, as well as that of probable cause, is for the jury to determine from the evidence. The jury may find from the evidence want of probable cause, and yet find that there was no malice in prosecuting the legal proceedings complained of, and in such case their verdict should be for the defendant. *Oliver* v. *Pate*, 43 Ind. 132.

In the instruction above copied, the element of malice was wholly ignored, and the jury were told, in substance, that if they found there was no probable ground for the appellant causing the appellee's arrest, their verdict must be for the appellee. Instructions, the same in legal effect as the above, were held erroneous in *Carey* v. *Sheets*, 67 Ind. 375.

Judgment reversed, at appellee's costs, with instructions to the court below to sustain the appellant's motion for a new trial.

Filed Feb. 21, 1884. Petition for a rehearing withdrawn May 28, 1884.

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No. 11,680.

GARRIGUS, GUARDIAN, *v.* ELLIS ET AL.

GUARDIAN AND WARD.—*Tort of Ward.—Parties.*—An action will not lie against a guardian for the tort of his ward; the latter should be sued alone.

From the Howard Circuit Court.

M. Garrigus and *J. E. Moore*, for appellant.
C. C. Shirley, for appellees.

BLACK, C.—The appellees sued the appellant, Milton Garrigus, guardian of Milton L. Garrigus. The complaint alleged that the plaintiffs were the owners of a certain mowing machine of the value of $20, which, by permission of one Stover, was stored for protection in his barn, in Howard county; that on, etc., the defendant's said ward wilfully, maliciously and mischievously broke, damaged and destroyed said machine, and hauled the fragments away, and sold them, and converted the proceeds to his own use, all without any authority from the plaintiffs, to their damage in the sum of $20, which sum was due and unpaid; that demand of payment had been made of said ward and of said guardian, but that they, and each of them, refused, etc. It was alleged that said guardian had in his hands a large amount of property and money belonging to said ward, out of which said sum might be paid after making ample provision for the support of said ward. Judgment was demanded for said sum against Milton L. Garrigus, that the same be ordered paid by his said guardian, Milton Garrigus, out of the funds in his hands belonging to his said ward's estate.

The appellant demurred to the complaint, assigning as grounds of demurrer want of sufficient facts, and defect of parties defendants, in that said ward, Milton L. Garrigus, was a necessary party defendant. The demurrer was overruled, and the appellant having refused to answer, judgment was rendered against him.

The appellant's ward was liable to an action for his tort described in the complaint, but no cause of action against the appellant was shown. The action should have been brought against the ward alone. It then would have been the duty of the guardian to appear for and defend, or cause to be defended, such suit against the ward; and if he should have failed to do so, the court would have appointed a guardian *ad litem* to defend the interests of the minor. R. S. 1881, sections 2520, 2521, 258; *Hughes* v. *Sellers*, 34 Ind. 337.

In such case the judgment would be an ordinary personal judgment against the minor. The guardian should be sued only where he is personally liable, when it is expected to obtain against him a personal judgment. *Clark* v. *Casler*, 1 Ind. 243; *Stevenson* v. *Bruce*, 10 Ind. 397; *Gwaltney* v. *Cannon*, 31 Ind. 227.

The judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellees, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

Filed May 29, 1884.

No. 10,449.

BOYD ET AL. *v.* PFEIFER.

SUPREME COURT.—*Assignment of Error.*—*Misjoinder in Error.*—An assignment of error jointly by several appellants, showing error against one of them only, presents no question to the Supreme Court.

From the Hancock Circuit Court.

M. Marsh and *J. H. Mellett*, for appellants.

J. A. New and *J. W. Jones*, for appellee.

BICKNELL, C. C.—The appellee brought this suit to foreclose a mortgage. The defendants were the widow and heirs

of the mortgagor and one Philander Boyd. There was a judgment against all the defendants that the mortgage be foreclosed.

The defendant Boyd appealed; the other defendants were duly notified of the appeal, and they became co-appellants. Their assignment of errors is as follows:

"Philander H. Boyd, Sarah E. Brown, Mattie E. Brown, Jacob E. Brown, Sadie Brown, appellants, *v.* Janetta Pfeifer, appellee.

"The appellants say there is manifest error, etc., in this, namely:

"1. The court erred in overruling the demurrer of the appellant Philander H. Boyd to the complaint.

"2. The court erred in sustaining the demurrer to the second and third paragraphs of the answer of Philander H. Boyd, appellant. For which errors the appellants pray that the judgment be in all things reversed.

(Signed) "M. and M.,
"Attorneys for appellants."

The appellee claims that these assignments of error present no question, and in this she is right.

The assignment of errors is the complaint of the appellants in this court, and no question will be considered which is not properly presented in such assignment. *Williams* v. *Riley*, 88 Ind. 290.

Here is a joint assignment of errors, with specifications, charging errors as against one only of the appellants. But a joint assignment of errors, like any other joint complaint, is not sufficient unless it states a cause of action in favor of all the co-parties. This has often been decided. *Owen* v. *Cooper*, 46 Ind. 524; *Durham* v. *Craig*, 79 Ind. 117; *Eichbredt* v. *Angerman*, 80 Ind. 208; *Towell* v. *Hollweg*, 81 Ind. 154; *Feeney* v. *Mazelin*, 87 Ind. 226.

No question being properly presented, the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing

opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed May 29, 1884.

No. 11,458.

Barcus *v.* Elliott et al.

Promissory Note.—*Consideration.*—Where, in a sale of land, the agent of the seller executes to the buyer a receipt for the amount of his commission, to operate as part payment of the purchase-money, a promissory note executed by the buyer to the agent, in consideration of such receipt, is valid.

From the Fulton Circuit Court.

E. Myers, for appellant.

I. Conner, for appellees.

Franklin, C.—Appellees sued appellant upon a promissory note for $150. The defendant answered want of consideration, failure of consideration, and a denial.

The plaintiffs replied by a denial, and averring a consideration received by the defendant. A demurrer was overruled to the second paragraph of the reply, and upon this ruling error has been assigned.

The second paragraph of answer substantially alleges that appellees were real estate agents, and that one Hively had employed them to sell for him a certain tract of land; that they applied to appellant to purchase the land; that he agreed to purchase the same; that Hively and wife signed and acknowledged a deed to him for the land, and placed it in the hands of the appellees to be delivered to him upon his paying on the land $1,200; that he was disappointed in getting the money to make the payment; that appellees claimed that Hively was indebted to them in the sum of $150 for their

services in selling the land, and he agreed with appellees that if they would sign a receipt to Hively for the $150, and deliver it to him, he would give them his note for that amount; the note and receipt were executed accordingly; that the note was not to be paid unless the receipt could be used as a payment on the land; that Hively refused to accept the receipt as a payment on the land, and that Hively was not indebted to appellees in that or any other sum. Wherefore the consideration had failed.

To this paragraph of answer the appellees replied that, by the terms of the contract between them and Hively, they were to have $150 out of the first money paid for their services in selling the land; that amount was due them from said Hively when they had made said sale to appellant; that appellant could not raise all the money to make the first payment on the land, and in order to give him time on that portion of it that was coming to them, they agreed with him to give him a receipt to Hively for that amount, and take his note, payable in bank, for their claim against Hively; that the note and receipt were exchanged in consideration of said agreement; that appellant had taken possession of the land under the sale, and had received the rents therefor.

We think the receipt was intended to and did operate as a valid transfer to appellant of appellees' claim against Hively, and that these allegations show a sufficient subsisting consideration for the note, and that there was no error in overruling the demurrer to this paragraph of the reply. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed May 29, 1884.

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2. *City.—Construction of Sidewalks.—Assignment of Estimates.—Suit Against Assignor and Assignee for Materials Furnished.—Consideration.—Rescission must be Pleaded.—Want of Consideration must be Pleaded.—Evidence.—Omission of Venue.—Demurrer.—Uncertainty.—Material Man.—Mechanic's Lien.*—S., having entered into a contract with a city to grade and pave certain sidewalks, assigned all his "interest in the estimates for" such "grading and paving," in writing, to H., who agreed therein "to receive the estimates when out and proceed to collect the same and pay all claims for material due for said work." Complaint by F. against S. and H., for material sold by F. to S. and used in said work, and alleging the making of estimates by the city engineer, their delivery to S., his delivery thereof to H., who *proceeded* to collect the same and paid part of F.'s claim, and that F. had notified H. that he, F., accepted his, H.'s, promise to pay.

Held, on demurrer by H., that the assignment of the estimates to H. purports a good consideration for his promise to pay.

Held, also, that S. and H. might have rescinded the assignment, but to avail themselves thereof as a defence, they must specially plead it, and, therefore, that the complaint need not negative a rescission.

Held, also, that to avail themselves of want of consideration as a defence, the defendants must specially plead it, and that evidence thereof is not admissible under the general denial.

Held, also, that it was not necessary to allege that the plaintiff had first attempted and failed to collect the debt from S.

Held, also, that the omission of the complaint to state the court in which suit was brought is not presented by the demurrer.

Held, also, that it was not necessary to allege that the material used had been furnished *for* the sidewalks in which it was used. The material man's lien law does not apply.

Held, also, that, after verdict, no question is presented by the demurrer because of the failure to allege that S. had not merely *proceeded* to collect, but had collected the estimates.

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3. *Same.—Maintenance.—Surety's Right to Maintain Suit Against Principal.*—In such action, the defendants having answered that S. had given bond to the city, with surety, to secure payment of claims for material, that such surety had paid F.'s claim, and that F. had brought this action solely for the benefit of the surety, the plaintiff replied setting out an agreement by the surety with F., to pay him the amount of his claim, interest, costs and attorney's fees if the action was defeated, and, if successful, to pay him the amount of the fees, judgment, costs and attorney's fees.

Held, on demurrer, that the surety had an interest in having the action prosecuted, and, therefore, was not illegally maintaining a suit, that the plaintiff is the real party in interest, and that the reply is sufficient. *Ib.*

4. *Same.—Joint Motion in Arrest not Available as to Separate Defendants.—Supreme Court.—Practice.*—In such action, no demurrer having been filed to the complaint by S., and there being no assignment of error questioning its sufficiency, no question as to its sufficiency against S. is presented to the Supreme Court by an alleged error in overruling a joint motion by S. and H. in arrest of judgment. *Ib.*

5. *Construction of.—Sale of Land.—Consideration Shown by Parol.—Pleading.*—The mortgagor of certain land, the mortgagee, and another lien-holder entered into a written agreement providing that the mortgagee should purchase said lien-holder's claim; should foreclose his own mortgage and procure title thereunder; should pay off certain other liens; should convey a specified portion of the land to the mortgagor's wife, and should pay a certain sum, less said liens and mortgage, to the mortgagor, upon his conveying the mortgaged premises to the mortgagee, free. In an action by the mortgagor against the mortgagee, on said agreement, alleging performance by the plaintiff, the defendant alleged performance by him, but averred that the holder of another lien, which plaintiff had agreed to pay, had redeemed from defendant's purchase at foreclosure; that plaintiff had failed to pay off such other lien, and, therefore, could not make to the defendant a good title.

Held, on demurrer, that the answer is good, that the consideration of the agreement might be shown by parol, and that defendant's written agreement to make certain payments only excludes the idea that he was to make other payments. *Harshman* v. *Heavilon*, *147*

6. *Church Subscription.—Consideration.—Object.—Performance.—Pleading.—Time of Payment.—Surplusage.*—A subscription read: "We, the undersigned, agree to pay the sum set opposite our respective names to the trustees of," etc., "for the purchase of a lot and the erection of a house of worship for the use of said church, size of said house to be 40 by 60; said sums to be paid as follows: one-half on June 1st, 1875, and one-half on January 1st, 1876." Complaint against a subscriber who was one of the trustees, to recover for his subscription.

Held, on demurrer, that the consideration for each subscription is the other subscriptions.

Held, also, that the complaint need not aver the completion of the house, such averment being surplusage. *Petty* v. *Trustees, etc.*, *278*

7. *Same.—Answer.*—An answer in such action, alleging that the house built was of different dimensions from that stated in the subscription, is insufficient. *Ib.*

8. *Same.—Delivery Part of Execution.—Denial.—Confession and Avoidance.*—The delivery of a subscription is as much a part of its execution as is the signing thereof, and a denial of its delivery is a denial of its execution, and such answer can not embody matter properly pleadable in confession and avoidance only. *Ib.*

9. *Contract for Bond.—Performance.—If Bond Adjudged Void, no Action on Contract.*—Where an indemnity bond, executed in performance of a preliminary contract for its execution, has been duly adjudged void, no subsequent action can, as a general rule, be maintained on either the bond or the contract. *Rhoads* v. *Jones*, *341*

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certain sum which the wife agreed should be a charge upon the lot; that the plaintiff performed the work according to the contract and the defendants, though requested, refuse to pay. The plaintiff having dismissed as to the wife, the husband demurred for want of facts.

Held, that the complaint, though informal, was good against him on demurrer. *Aughie* v. *Landis*, *419*

11. *Same.*—In an action upon a contract where the general averments of the complaint show that the claim is due and unpaid, the complaint is sufficient without averring such facts in terms. *Ib.*

12. *Broker.—Lien.—Loan Agent.*—One employed to obtain a loan upon a commission has a lien on the fund for his fees, and may retain them. *Vinton* v. *Baldwin*, *433*

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15. *Consideration.—Conditional Sale.—Promissory Note.*—A contract for the payment of money, showing the actual consideration to be an article of personal property, and stipulating that the purchaser's title is dependent upon such payment, will support a complaint thereon for recovery of the money. *Fleetwood* v. *Dorsey, etc., Co.*, *491*

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COUNTY COMMISSIONERS.

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6. *Assault with Felonious Intent.—Murder.—Instruction.*—Upon an indictment for assault and battery with intent to commit murder, there may be conviction of assault and battery with intent to commit murder in the second degree, or voluntary manslaughter, or there may be a conviction for an assault and battery only, and to instruct that if no felonious intent be proven, conviction may be of *such* assault and battery if the evidence warrants it, can not mislead the jury.
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7. *Forgery.—Promissory Note.—Execution.—Indictment.*—Where the defendant is charged with forgery, in uttering and passing as true a forged promissory note, of which a copy is set out, the indictment will not be held bad on motion to quash, merely because of the defective or imperfect execution of the note, when it appears on its face to be such an instrument as might deceive. *Lemasters* v. *State*, *367*

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9. *Same.—New Trial.—Separation of Jury.—Supreme Court.—Statute Construed.*—In a criminal case the separation of the jury after retirement to deliberate, unattended by an officer, without leave of court, though made a cause for new trial by statute, R. S. 1881, section 1842, yet, in view of section 1891, the Supreme Court can not reverse on that ground where it affirmatively and clearly appears that the substantial rights of the defendant suffered no injury; but if in such case there be a doubt of guilt from the evidence, or whether the the jury were tampered with, it will reverse. *Ib.*

10. *Incest.—Evidence.*—On the trial of an indictment for incest, after evidence of incestuous intercourse had been introduced, the State offered to prove prior acts of indecent familiarity and sexual connection between the parties, for the purpose of strengthening the evidence already in.

Held, that it was error to exclude the offered evidence. *State* v. *Markins*, *464*

11. *Assault.—Assault and Battery.—Intent.—Indictment.—Duplicity.*—Where the defendant is charged in technical terms, in a single count, with an assault, and an assault and battery, with the intent to commit a felony, for each of which offences the same punishment is prescribed in section 1909, R. S. 1881, there is no such duplicity therein as will afford sufficient ground for quashing the indictment. *Siebert* v. *State*, *471*

12. *Same.—Prosecuting Attorney.—Additional Counsel.—Discretion of Trial Court.*—It is in the discretion of the trial court to allow additional counsel to assist the prosecuting attorney in the prosecution of a criminal cause, and, unless the record affirmatively shows an absolute abuse of such discretion, the Supreme Court will not be authorized to review its exercise. *Ib.*

13. *Same.—Idem Sonans.—Names.—Question of Fact.*—Whether two names of slightly variant orthography are, or are not, *idem sonans*, is a question of fact for the jury, and not of law for the court. *Ib.*

14. *Same.—Instructions.*—The instructions of the trial court to the jury are construed by the Supreme Court with reference to each other, and as an entirety; and if, thus construed, the entire instructions present the law fairly and correctly, and are not calculated to mislead, the judgment will not be reversed thereon, even though a single expression, detached from its context, might be erroneous. *Ib.*

15. *Same.—Merger.—Jurisdiction of Justice of the Peace.—Former Acquittal or Conviction.*—An assault, or an assault and battery, is merely a misdemeanor, but, when committed with the intent to commit a felony, it becomes itself a felony wherein the misdemeanor is merged; and, as a justice of the peace has no jurisdiction to try and acquit or convict a defendant charged with a felony, when the jury find him guilty of the felonious intent charged, then it becomes the duty of the jury, without regard to the proceedings before the justice, to convict the defendant of the felony charged in the indictment. *Ib.*

16. *Misconduct of Juror.—New Trial.*—To make the fact available as cause for a new trial, that a juror took notes of the evidence and read them in the jury room, no objection having been made, it must appear that not only the defendant, but also his attorney, was not aware that the juror took notes. *Long* v. *State*, *481*

17. *Same.—Verdict.—Practice.*—Neither the affidavit of a juror nor his statements can be used to overthrow a verdict. *Ib.*

18. *Same.—Supreme Court.—Evidence.*—Where the court below hears evidence on a motion for a new trial on account of the misconduct of a juror, the Supreme Court will not weigh the evidence. *Ib.*

19. *Same.—Misconduct of Witness.*—The misconduct of a witness for the State is not cause for a new trial. *Ib.*

20. *Same.—Duty and Conduct of Judge.*—A judge presiding at a criminal trial is not a mere moderator, but has active duties to perform, without partiality, in seeing that the truth is developed, and to that end he may put proper questions to witnesses. *Ib.*

21. *Same.—Evidence.*—It being a question whether the defendants were present when shots were fired, evidence that one of them was shortly after seen not far away getting over his back fence, and being asked what was the matter, said, "It's Dave and S.," the name of the party into whose house the shots were fired, is proper as against himself. *Ib.*

22. *Same.—Instructions as to Form of Verdict.*—The giving by the court to the jury of forms of verdict applicable in case of conviction, none being asked or given applicable to acquittal, is not error. *Ib.*

23. *Same.—Assault and Battery.—Intent.—Instruction.—Harmless Error.*—Upon an indictment for assault and battery, with intent to commit murder in the first degree, the jury so found, assessing the lowest penalty allowed by section 1909, R. S. 1881.

Held, that an erroneous instruction, defining the case proved as evincing an intent to commit murder in the first degree, instead of an intent to commit manslaughter, was harmless. *Ib.*

24. *Self-Defence.—Modifying Instructions.*—An instruction was asked to the effect that a party assailed may take life to avoid *very considerable* bodily harm. The court modified this by the use of the word "great" instead of "very considerable."

Held, no error. *Behymer* v. *State*, *140*

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DECEDENTS' ESTATES.

See TRUST AND TRUSTEE; WITNESS.

1. *Contract of Administrator.—Claim.—Pleading.—Statute of Frauds.*—Complaint in two paragraphs, in the ordinary form, against an administrator: 1. Alleging a contract with the defendant to saw for him certain logs of the decedent into lumber at a certain price; that the work was done, and the defendant failed to pay on request. 2. Alleging a promise of the defendant to pay a certain sum for sawing lumber for the decedent in his lifetime, which lumber remained in the plaintiff's possession, and on which he held a lien for the sawing; that the lumber was delivered to the defendant on his promise to pay for the sawing, and that on request he failed to pay.

Held, that both paragraphs were good on demurrer. *Bott* v. *Barr*, *243*

2. *Creditors Paid by Widow.—Subrogation.*—A widow has such an interest in the settlement of her deceased husband's estate as will, where it is beneficial to such estate, subrogate her to the rights of creditors of the estate whose claims she has paid off, or whose claims have been paid by the executor or administrator with money advanced by her for that purpose. *Brown* v. *Forst*, *248*

3. *Same.—Administrator can not Bind Estate.—Contract.*—Her right to be reimbursed in such case depends solely on the doctrine of subrogation, and not on any contract made by her with the executor or administrator. *Ib.*

4. *Same.—Evidence.—Validity of Claim.—Statute of Limitations.*—Where she seeks to be subrogated in such case, the evidence must show that claims paid off by her were valid claims against the estate, and that her right to recover is not barred by the statute of limitations. *Ib.*

5. *Claim Against.—Promissory Note.—Attorney's Fees.—Pleading.—Demand.*—Where a promissory note stipulating for the payment of attorney's fees is filed against a decedent's estate, the claimant is entitled to introduce evidence of the value of attorney's fees, without any formal demand in such claim for judgment. *Hanna* v. *Fisher*, 383

6. *Same.—Costs.—Claim.—Verification of.*—Where a claim against a decedent's estate is verified by some one other than the claimant, that fact will not authorize the taxing of costs against him, although the claim does not disclose that the affiant is the agent or attorney of the claimant. *Ib.*

7. *Same.—Costs where a Claim is not Verified.*—If a claim against a decedent's estate be not duly verified until after it has been filed, the claimant, under section 2310, R. S. 1881, shall be bound for all costs in the prosecution of the claim. *Ib.*

8. *Payment.—Pleading.*—A general plea of payment to a claim against an estate, without stating time, is good on demurrer. *Epperson* v. *Hostetter*, 583

9. *Same.—Statute of Limitations.*—To a claim upon an account against an intestate's estate, a plea, that the cause of action did not accrue within six years before bringing the action, is bad. *Ib.*

DEED.

See CONTRACT, 5; CONTRIBUTION; FRAUDULENT CONVEYANCE; MORTGAGE, 8; TAXES, 1 to 3, 5, 8; VENDOR AND VENDEE.

DEFAULT.

See SHERIFF, 5.

DEFECTS CURED.

See APPEAL BOND; PLEADING, 13; REAL ESTATE, ACTION TO RECOVER.

DELIVERY.

See CONTRACT, 8.

DEMAND.

See DECEDENTS' ESTATES, 5; PROMISSORY NOTE, 2.

DEMURRER.

See CONTRACT, 2; DEMURRER TO EVIDENCE; PLEADING, 2, 4 to 8, 14, 16; PRACTICE, 4, 9, 10; SUPREME COURT, 19.

DEMURRER TO EVIDENCE.

Who may Demur.—The party who has the burden of proof can not demur to the evidence. *Standley* v. *Northwestern, etc., Ins. Co.*, 254

DESCENTS.

Inheritance from Adopted Child.—Rule of Inheritance.—Where an adopted child dies intestate, unmarried and without lawful issue, or their descendants, surviving him or her, seized of real estate or owning personal property, which may have come to such child by gift, devise or descent from the adopting parent or parents, father or mother, such real estate or personal property shall descend to the adopting father

or mother, if living, or, if dead, to the heirs at law of such adopting father or mother, to the entire exclusion of the natural heirs of such adopted child from any share or interest therein. *Davis* v. *Krug, 1*

DESCRIPTION.

See DRAINAGE, 4; HIGHWAY, 2; JUDGMENT, 5; MORTGAGE, 1, 2, 5, 6, 8 to 10; PARTITION, 3; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 1; WILL, 5.

DISCRETION.

See CRIMINAL LAW, 12; GUARDIAN AND WARD, 1; PRACTICE, 3, 6, 11, 15.

DISMISSAL.

See COSTS; PRACTICE, 1; SUPREME COURT, 4, 5.

DIVORCE.

Complaint.—It is not necessary to use the language of the statute in setting forth causes for a divorce. *Murphy* v. *Murphy, 430*

DRAINAGE.

1. *Circuit Court Act.—Complaint to Collect Assessment.—Petition, Notice, Kinship.—Presumption.*—In an action to collect ditch assessments under the circuit court act, the complaint need not allege that the petition for the ditch had been verified, nor that notice thereof had been given, nor that the commissioners of drainage were not of kin to the parties interested, the presumption being, in the absence of an allegation to the contrary, that in each of these particulars the statute was complied with. *Albertson* v. *State, ex rel., 370*
2. *Same.—Copy.*—Such complaint is based upon the assessments, and, therefore, need not set out a copy of the judgment approving the report of the ditch commissioners. *Ib.*
3. *Same.—Approval of Assessments.—Judgment.*—Such complaint sufficiently alleges that such assessments were approved by the court, when it alleges "that three days had elapsed since the filing of the report, and, no remonstrance being filed, the court approved said report and appointed the relator as ditch commissioner to construct" the ditch. *Ib.*
4. *Petition.—Description.*—A petition for drainage under the act of March 9th, 1875, was only required to describe *generally* the starting point, route and terminus of the work proposed. It need not be particular or exact. *Wright* v. *Wilson, 408*
5. *Same.—Practice.—Supreme Court.*—In such case a motion to dismiss the petition, based on facts found by the court to be untrue, can not be considered by the Supreme Court. *Ib.*
6. *Same.—Appeal.—Jurisdiction of Circuit Court.—County Commissioners.*—On appeal to the circuit court in such cases, its jurisdiction is not affected by the fact that the order of the county board appealed from was entered at a time when the board had no power to act upon the matter. *Ib.*
7. *Same.—Parties.*—One, through whose lands the drain will run, must be a party to the proceedings by notice or otherwise, and unless this appear on the trial the whole proceeding must fail. *Ib.*

DUPLICITY.

See CRIMINAL LAW, 11.

EJECTMENT.

See COSTS.

ELECTION.

See CORPORATION.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 6.

EQUITY.

See CONTRIBUTION.

ESTOPPEL.

See EVIDENCE, 4.

EVIDENCE.

See BILL OF EXCEPTIONS, 2; CONTRACT, 2, 5, 16; COSTS; CRIMINAL LAW, 2, 10, 16, 21; DECEDENTS' ESTATES, 4, 5; DEMURRER TO EVIDENCE; INSTRUCTIONS TO JURY, 5, 6, 8, 10; INTOXICATING LIQUOR, 2; JUDGMENT, 1, 2; MALICIOUS PROSECUTION, 5 to 8; MALPRACTICE, 1 to 4; NEGLIGENCE, 3, 4; NEW TRIAL, 3, 4; PARTITION, 1, 3; PRACTICE, 1, 7, 13; RAILROAD, 4, 9; REPLEVIN, 3; SHERIFF, 2, 3; SHERIFF'S SALE, 1; SLANDER, 3; SUPREME COURT, 3, 6, 9 to 13, 15, 20 to 22, 24 to 26; TAXES, 8; VERDICT.

1. *Hearsay.*—Hearsay statements are not admissible in evidence, even in mitigation of damages. *De Pew* v. *Robinson, 109*

2. *Same.*—The statement of a sick person as to the nature and symptoms of the affliction under which he is suffering is always original evidence. *Ib.*

3. *Same.—Harmless Error.*—The admission of a harmless statement does not constitute an available error. *Ib.*

4. *Admissions.—Estoppel.—Former Adjudication.—Partnership.*—Suit between partners for an accounting, etc.; it appearing that the funds of the firm came to the hands of the defendant, he offered to prove that $225 thereof which he handed to the plaintiff for a partnership use the latter admitted he had used for himself. It appeared that the defendant and another, as partners, had before sued the plaintiff for this $225 and failed to recover it. The evidence offered was rejected.

Held, that this was error. *Kitson* v. *Hillabold, 136*

5. *Witness.—Expert.*—An expert may not only give his opinion, but may state facts which are the result of scientific knowledge or professional skill. *Jones* v. *Angell, 376*

EXCEPTIONS.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY, 2; SPECIAL FINDING.

EXECUTION.

See FRAUDULENT CONVEYANCE, 3; REDEMPTION, 4; SHERIFF, 1 to 3; SHERIFF'S SALE; WIDOW.

Simultaneous Executions.—Priority.—Judgment.—Time.—Where a number of judgments are rendered by a circuit court against the same defendant, on the same day, are duly signed on the next day, and upon præcipes filed in immediate succession, executions are issued in like manner by the clerk, the issuing is but one transaction and no priority exists. *State, ex rel.*, v. *Cisney, 265*

EXEMPTION.

See FRAUDULENT CONVEYANCE, 3; SHERIFF'S SALE, 1, 2; WIDOW.

EXHIBIT.

See CRIMINAL LAW, 7; DRAINAGE, 2; PARTITION, 1; TELEGRAPH, 4.

EXPERT.

See EVIDENCE, 5; MALPRACTICE, 2.

EXTENSION OF TIME.

See PROMISSORY NOTE, 4.

FALSE IMPRISONMENT.

Justification.—Marshal.—Constable.—To an action for false imprisonment against a marshal or constable, an answer, that the defendant found the plaintiff on the street intoxicated, and having just assaulted a citizen, and arrested and detained him three hours until he became sober, when a criminal charge was regularly made before a justice, and the plaintiff fined, etc., is good on demurrer. *Wiltse* v. *Holt*, *469*

FEES AND SALARIES.

See COUNTY SUPERINTENDENT.

FENCE.

See RAILROAD, 2 to 4.

FINDING.

See SPECIAL FINDING; SUPREME COURT, 9, 10, 24; VERDICT.

FIREARMS.

See CRIMINAL LAW, 4, 5.

FORECLOSURE.

See CONTRACT, 5; CONTRIBUTION; INSURANCE, 2; JUDGMENT, 5; MORTGAGE; PROMISSORY NOTE, 5; VOLUNTARY PAYMENT, 1.

FORGERY.

See CRIMINAL LAW, 7.

FORMER ACQUITTAL OR CONVICTION.

See CRIMINAL LAW, 15.

FORMER ADJUDICATION.

See EVIDENCE, 4; HIGHWAY, 5.

FRAUD.

See CORPORATION; FRAUDULENT CONVEYANCE; REPLEVIN, 3; TRUST AND TRUSTEE; VOLUNTARY ASSIGNMENT.

FRAUDULENT CONVEYANCE.

1. *Consideration.—Husband and Wife.*—Upon a finding of facts that a husband is indebted to his wife, that he has sufficient property to pay all his debts, that he caused certain real estate to be conveyed by the grantor to his wife, that she never after claimed the debt against her husband, and that he had caused such conveyance to be made to her to settle difficulties between him and her, it is not erroneous in the court to conclude that such sale was not fraudulent. *Secor* v. *Souder*, *95*
2. *Same.—Redemption by Husband, of Wife's Property.*—Where a husband redeems land sold on foreclosure against his wife to satisfy a mortgage thereon existing at the time of the marriage, there is a valid consideration for a conveyance of the land to him. *Ib.*
3. *Action to Set Aside.—Amount Exempt from Execution.*—A voluntary conveyance may be avoided by creditors upon allegation and proof that the debtor, at the time he made the conveyance, had no other property than that which he could claim as exempt from execution.
Williams v. *Osborne*, *347*

GENERAL ASSEMBLY.

See LEGISLATURE.

GRAVEL ROAD.

1. *Appeal.—County Commissioners.*—One who, in proper time, files an affidavit showing a substantial interest in the subject, and that he is aggrieved, and a proper bond, has a right to appeal from an order of the

county commissioners establishing and ordering the construction of a gravel road, though he did not appear before the board.
Fleming v. *Hight*, 78

2. *Same.—Trial.*—In such case the circuit court tries the cause *de novo*, and does not sit as a court for the correction of errors. *Ib.*

GUARDIAN AND WARD.

1. *Failure to File Inventory.—Removal.*—The removal of a guardian for failure to file an inventory within three months from his appointment, as required by section 2521, R. S. 1881, is much in the discretion of the court, and its action in refusing to remove will not be reversed if an excuse be shown for the guardian's failure, which is not clearly insufficient. *Johnson* v. *Metzger*, 307

2. *Tort of Ward.—Parties.*—An action will not lie against a guardian for the tort of his ward; the latter should be sued alone.
Garrigus v. *Ellis*, 598

HARMLESS ERROR.

See CRIMINAL LAW, 23; EVIDENCE, 3; INSTRUCTIONS TO JURY, 8, 9; MALICIOUS PROSECUTION, 5, 6; PLEADING, 2, 4; PRACTICE, 9, 14; SHERIFF, 2; SUPREME COURT, 3, 11, 13, 20; VENDOR AND VENDEE, 2.

HEIRS.

See DESCENTS.

HIGHWAY.

See RAILROAD, 1.

1. *Appeal.—Trial.—Practice.*—In an appeal from the county commissioners from an order establishing a highway, the report of viewers or reviewers is not in question, but the cause is to be tried *de novo*.
Clift v. *Brown*, 53

2. *Same.—Description of, in Petition.*—A petition for a highway, which describes it so that a surveyor could locate it, is sufficient, if otherwise without fault. *Ib.*

3. *Opening of, by Supervisor.—Suit for Trespass.—Answer in Justification.*—One sued as a trespasser may justify the acts complained of as being done by him as a road supervisor while opening a highway, duly located, on a sufficient petition and notice, by the proper board of commissioners. But, where he thus justifies, he must not only allege such order of location, but also facts showing that his acts under such order were lawful, or he will be held a trespasser *ab initio*.
Rutherford v. *Davis*, 245

4. *Same.—Notice to Land-Owners by Supervisor.*—Under the act of 1852, creating the office of road supervisor, and under that of 1881, creating the office of township superintendent, and also under the act of 1883, abolishing the latter and reviving the former, such officer must, before opening a highway, give to owners of lands affected the sixty days' notice required by section 5030, R. S. 1881. *Ib.*

5. *Remonstrance.—Res Adjudicata.—Public Utility.—Damages.*—Where a remonstrance, alleging inutility, has been filed against a petition for a highway, and decided against the remonstrants by the board of commissioners, upon the report of reviewers, a subsequent remonstrance upon the same ground, by any of such remonstrants, will not lie, but one may be filed, before final action by the board, for damages.
Denny v. *Bush*, 315

6. *Same.—Appeal.—Refiling Remonstrance in Circuit Court.*—It is error in the county board to dismiss such remonstrance for damages, but a remonstrator can not, upon an appeal to the circuit court, in which he does not join, there refile such remonstrance. *Ib.*

7. *Same.—Plea in Abatement in Circuit Court.*—Where, upon such appeal to the circuit court, a jury has been sworn to try the case, and some evidence introduced, the remonstrants can not then first file a plea in abatement, alleging objections to the qualifications of the petitioners. *Ib.*

8. *Same.*—Such a plea in abatement, alleging that one of the petitioners had been induced to sign the petition upon the promise of other petitioners to build a fence which would be rendered necessary by the location and opening of the highway, is insufficient. *Ib.*

HUSBAND AND WIFE.

See CONTRACT, 10; CONTRIBUTION, 2; FRAUDULENT CONVEYANCE, 1, 2; PROMISSORY NOTE, 2.

INCEST.

See CRIMINAL LAW, 10.

INDEMNIFYING BOND.

See CONTRACT, 9.

INDICTMENT.

See CRIMINAL LAW, 1, 7, 8, 11.

INFANT.

See INTOXICATING LIQUOR, 3.

INFORMATION.

See CORPORATION.

INJUNCTION.

See TAXES, 4.

INSOLVENCY.

See PARTNERSHIP; VOLUNTARY ASSIGNMENT; VOLUNTARY PAYMENT, 1; WILL, 3.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 6, 14, 22, 23; MALICIOUS PROSECUTION, 2, 5, 6; MALPRACTICE, 3 to 5; NEW TRIAL, 3; PRACTICE, 14; SALE, 4; SUPREME COURT, 8, 11 to 13, 18.

1. That an instruction is not more specific, is no valid objection to it if it contain a correct general statement of the law. *Behymer* v. *State*, *140*

2. *Same.—Exceptions.—Practice.*—An exception to an instruction taken under section 535, R. S. 1881, which is not dated, presents no question in the Supreme Court. *Ib.*

3. *Same.—Self-Defence.—Modifying Instructions.*—An instruction was asked to the effect that a party assailed may take life to avoid *very considerable* bodily harm. The court modified this by the use of the word "great" instead of "very considerable."

Held, no error. *Ib.*

4. *Request for Written.—Statute Mandatory.*—The statute, requiring that "the court shall give general instructions to the jury * * *in writing*, if required by either party," is mandatory, and, in such case, the giving of an oral instruction is erroneous. *Bradway* v. *Waddell*, *170*

5. *Same.—Oral Directions.*—Oral directions to the jury to reject evidence, or as to the form of their verdict, are not "instructions;" but statements of rules of law governing the matters in issue or the amount of recovery are. *Ib.*

6. *Presumption.*—In the absence of the evidence, and of a statement that instructions refused were applicable to the evidence, those refused will be deemed to have been properly rejected for such reason, and those

given properly given, unless erroneous under any supposable state of facts. *Peoria, etc., R. W. Co.* v. *Flicker, 180*

7. Though a single instruction taken alone might be erroneous, yet, if all relating to the subject, when taken together, express the law correctly, there is no available error. *Lytton* v. *Baird, 394*

8. *Harmless Error.*—An instruction which is not correct, but can not possibly mislead when applied to the evidence of the particular case, is harmless. *Poland* v. *Miller, 387*

9. *Same.—Set-Off.*—An instruction that if the jury find for the plaintiff, after ascertaining the plaintiff's damages, an admitted set-off shall be deducted therefrom is harmless in a case where the plaintiff's damages are assessed at a sum greater than the set-off. *Ib.*

10. *Same.*—An instruction that if the jury believe that the facts averred, etc., are true, they must find for the plaintiff, so clearly implies that the belief must be founded on the evidence, that it is unobjectionable. *Ib.*

11. *Supreme Court.*—The instructions of the trial court to the jury are construed by the Supreme Court with reference to each other, and as an entirety; and if, thus construed, the entire instructions present the law fairly and correctly, and are not calculated to mislead, the judgment will not be reversed thereon, even though a single expression, detached from its context, might be erroneous. *Siebert* v. *State, 471*

INSURANCE.

1. *Life Insurance.—Right to Recover Premiums.*—Where the risk has once attached, premiums can not be recovered, although the company may subsequently wrongfully declare a forfeiture of the policy. *Standley* v. *Northwestern, etc., Ins. Co., 254*

2. *Same.—Right of Assured to Specific Performance.—Set-Off.—Foreclosure of Mortgage.*—An agreement to issue a paid-up policy may be specifically enforced, but the right to specific performance can not be made the ground of counter-claim to a suit by the insurance company to foreclose a mortgage executed to secure a loan of money. *Ib.*

3. *Same.—Contract.—Motive.—Consideration.*—The premium paid, or agreed to be paid, for a policy of insurance is the consideration of the contract, and not the motive which induced the assured to take out the policy. *Ib.*

INTENT.

See CRIMINAL LAW, 2, 6, 11, 23.

INTEREST.

See JUSTICE OF THE PEACE, 3.

INTERROGATORIES TO JURY.

See PRACTICE, 12, 15.

1. *Verdict.—Supreme Court.*—Answers by the jury to special interrogatories returned with a general verdict will not be considered by the Supreme Court, unless it appears by the record that the court, at the request of a party, sent them to the jury. *Graves* v. *Thomas, 361*

2. *Practice.—Answers to Interrogatories.—Judgment Non Obstante.*—Where the facts found by answers to interrogatories are irreconcilable with the general verdict, the former must prevail. *Fleetwood* v. *Dorsey, etc., Co., 491*

INTOXICATING LIQUOR.

1. *Criminal Law.—Unlawful Sale of Intoxicating Liquor.—Juror.—Competency.*—A juror who believes that a moral man would not sell whiskey, and who would not as readily believe the testimony of one who so

sells as he would that of a moral man, but who thinks he can nevertheless give the defendant an impartial trial, is not incompetent in a prosecution for selling liquor without license, it not appearing that the defendant was engaged in the sale of intoxicating liquors, or that the juror was prejudiced against the defendant. *Shields* v. *State*, 299

2. *Same.—Evidence.—Premises.*—Proof upon trial of an indictment for the unlicensed sale of liquor to be drank on the defendant's premises, that the liquor was drank on the lot on which the defendant's shop was situated, out of glasses furnished by him, and that the same place was used for drinking by the defendant's customers, with his knowledge and consent, is admissible upon the question whether that place was on his premises. *Ib.*

3. *Bartering Liquor with Minor for Pool Check.—Presumption of Value.*—An affidavit charging the defendant with bartering one pint of intoxicating liquor to a minor for a pool check is sufficient without alleging either the value of such check or that it was an article of value. *Forkner* v. *State*, 406

JEOPARDY.

See CRIMINAL LAW, 15.

JOINDER.

See SUPREME COURT, 23; VOLUNTARY ASSIGNMENT, 1.

JUDGE.

See CRIMINAL LAW, 20; SUPREME COURT, 17.

JUDGMENT.

See CONTRACT, 4, 9; CONTRIBUTION, 3; DRAINAGE, 2, 3; EXECUTION; JUSTICE OF THE PEACE, 3; MALICIOUS PROSECUTION, 6; MORTGAGE, 3, 4, 7, 8 to 10; NOVATION; PARTNERSHIP; REDEMPTION, 4; SUBROGATION; SUPREME COURT, 1; VERDICT, 4.

1. *Review of.—New Trial.—Evidence.—Record.*—In a bill to review for error apparent of record, on the ground that the court erred in overruling a motion for a new trial, no question is presented as to the sufficiency of the evidence or the amount of damages, unless the evidence was made a part of the record. *Peoria, etc., R. W. Co.* v. *Flicker*, 180

2. *Same.—Complaint.*—An averment in the complaint that a full transcript of the evidence is filed is not sufficient, as this may be done, and yet the evidence may not have been made a part of the record. *Ib.*

3. *Practice.—Motion to Modify Judgment.*—A motion to modify a judgment, on the ground that the evidence did not authorize it, can not be sustained. *Strange* v. *Tyler*, 396

4. *Confession of Judgment.*—A judgment on a claim not due, rendered by confession, is not void. *Calloway* v. *Byram*, 423

5. *Correction of Misdescription of Land Ordered Sold in Decree of Foreclosure. —Amendment.—Parties.—Practice.*—The amendment of a clerical error in a judgment entry is made summarily on motion, and a motion for a new trial therein is not warranted; it can only be done at the instance of a party to the record and upon clear evidence that the entry, by reason of clerical error, does not show the judgment actually pronounced by the court. A purchaser of lands upon a decree of foreclosure or his assignee has no standing to make the motion to correct the description of the lands directed to be sold. *Runnels* v. *Kaylor*, 503

JUDICIAL KNOWLEDGE.

See RAILROAD, 9; SUPREME COURT, 21.

JURISDICTION.

See CRIMINAL LAW, 15; DRAINAGE, 6; JUSTICE OF THE PEACE, 3; SUPREME COURT, 5.

JUROR.

See CRIMINAL LAW, 9, 16 to 18; INTOXICATING LIQUOR, 1; PRACTICE, 6, 12; SUPREME COURT, 25, 26; VERDICT, 6.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 15; TELEGRAPH, 3; TOWN, 1.

1. *Pleading.—Complaint against Railroad Company for Killing Stock.*—A complaint before a justice of the peace against a railroad company, averring that, on, etc., at, etc., the defendant's servants wilfully and negligently, and without any fault of the plaintiff, ran its cars upon plaintiff's mare, whereby, etc., is sufficient after verdict.

Pennsylvania Co. v. *Rusie*, *236*

2. *Same.—Appeal.—Practice.*—Where on appeal from a justice of the peace, the complaint is amended in the circuit court, its sufficiency is to be determined by the rules of pleading before justices of the peace. *Ib.*

3. *Jurisdiction.—Judgment.*—A promissory note for $300, dated three days before its execution, and bearing interest at 8 per cent. per annum, was filed as the cause of action before a justice of the peace. The note was, in fact, executed on the date it was filed, and on the same day there was judgment by confession for $300.

Held, that the amount demanded by the cause of action—the note—must, under the circumstances, be regarded as only $300, without adding interest for three days according to the face of the note, and therefore the justice had jurisdiction and the judgment was valid.

Calloway v. *Byram*, *423*

LAW OF THE CASE.

See SUPREME COURT, 1.

LEGACY.

See WILL, 2, 3.

LEGISLATURE.

1. *Legislative Appropriation.—Brevier Reports.*—The act of January 9th, 1883, making an appropriation to pay the expenses of the 53d General Assembly, did not appropriate any money to the payment of expenses of any former General Assembly, nor could payment for Brevier Reports of proceedings and debates of that General Assembly be made out of said appropriation, in the absence of a definite allowance therefor made by the concurrent action of the two houses, which was not done.

Rice v. *State, ex rel.*, *33*

2. *Same.—Legislative Power.—Separate and Concurrent Resolutions of Each Branch of General Assembly.*—Separate resolutions of each house, authorizing payment for Brevier Reports, could not amend or vary the provisions of the statute, which required concurrent action of the two houses.

Ib.

LIBEL.

See SLANDER.

1. *Letter.*—A letter written to C. by H., concerning B., was as follows: "I was unfortunate enough to have him in my employ at one time as a book-keeper. He is a liar. I would not believe him under oath."

Held, on demurrer to a complaint for libel, that each of the three sentences is libellous.

Hake v. *Brames*, *161*

2. *Same.—Justification as to only One of Several Sets of Words.*—An answer in such action, seeking to justify by alleging that the plaintiff had lied on one occasion, even if a defence to the second set of words, is not

as to the others, and, pleaded to a complaint setting out the three sets of words, is insufficient. *Ib.*

LIEN.

See CONTRACT, 2, 5, 12; DECEDENTS' ESTATES, 1; MORTGAGE; PROMISSORY NOTE, 5; TAXES; VENDOR AND VENDEE, 1; WILL, 2, 3.

LIFE-ESTATE.

See SHERIFF'S SALE, 1; WIDOW; WILL, 1.

LIFE INSURANCE.

See INSURANCE.

MAINTENANCE.

See CONTRACT, 3.

MALICE.

See MALICIOUS PROSECUTION, 7, 8; SLANDER, 4.

MALICIOUS PROSECUTION.

1. *Probable Cause.*—The existence of probable cause for a criminal prosecution does not depend upon the guilt of the accused. *Lytton* v. *Baird*, 349

2. *Same.—Instructions.*—To a suit on a note it was pleaded that the execution of the note was procured at W. by certain false statements, and issue was formed thereon. A witness on the trial was indicted for perjury, and, being discharged, sued for malicious prosecution, and upon that trial the court instructed that on the trial of the suit on the note, the place of its execution was not a material matter.

Held, that the instruction was correct. *Ib.*

3. *Same.—Probable Cause, Mixed Question of Law and Fact.*—The question of probable cause is a question of law, where the facts touching it are not disputed; but if the facts be in question, then it is a mixed question of law and fact, to be left to the jury under proper instructions. *Ib.*

4. *Same.—Exemplary Damages.*—Exemplary damages may be given in an action for malicious prosecution. *Ib.*

5. *Same.—Measure of Damages.—Instruction.—Evidence.—Harmless Error.*—Where the complaint in a suit for malicious prosecution claimed special damages only for the expenses of his defence, it is error to instruct that he is entitled to compensation for "expenses and *losses* sustained by reason of the prosecution;" but if there be no evidence of expenses and losses sustained except in preparing his defence, the error is harmless, as against the defendant. *Ib.*

6. *Same.—Judgment.*—The record of the criminal case upon which the suit for malicious prosecution was founded was in evidence, and showed a judgment in these words: "The defendant moves to quash the indictment herein, which motion the court sustains, and said defendant is discharged."

Held, that this, though informal, was a good judgment, ending the prosecution and discharging the defendant.

Held, also, that it was error to refuse to instruct that without proof that the criminal prosecution had terminated in the plaintiff's favor, he could not recover, but the error was harmless in view of the record evidence, which was conclusive proof of the fact. *Ib.*

7. *Same.—Advice of Counsel.—Evidence of Malice.*—If a party, upon a full statement of the facts within his knowledge, and for an honest purpose, acts upon the advice of counsel in procuring a criminal prosecution, the fact is evidence to rebut malice and want of probable cause, but it is not conclusive. *Ib.*

8. *Malice.*—Without proof of malice, an action for malicious prosecution can not be maintained, nor does the law infer malice from the want of probable cause. *Strickler* v. *Greer*, 596

MALPRACTICE.

1. *Action against Surgeon.—Evidence.*—In an action against a surgeon for malpractice, the admission of evidence by the defendant, that he had neither received nor charged any fee for his services, is harmless to the plaintiff. *Jones* v. *Angell*, 376
2. *Same.—Opinion as to Skill.*—In such action it was competent for the defendant to testify that a surgeon who had assisted him to perform the act of surgery in question, was skilful. *Ib.*
3. *Same.—Instruction as to Failure of Proof.*—It was proper to instruct the jury that if the plaintiff's evidence failed to preponderate as to any material allegation of any paragraph of his complaint, he could not recover on that paragraph; and that, if the evidence as to any material allegations of each paragraph was so balanced that there was no preponderance in his favor, he could not recover at all. *Ib.*
4. *Same.—Contributory Negligence.*—Evidence of alleged disobedience by the defendant of the professional instructions of the plaintiff, may properly be referred to by the court, in its instructions, in directing the attention of the jury to the question of contributory negligence. *Ib.*
5. *Same.—Words of Synonymous Meaning.*—Where, in such instructions, the court, in referring to the skill required of the defendant, uses the terms "*fair*" knowledge as the synonym of "*reasonable*" knowledge, there is no error. *Ib.*

MANDAMUS.

See AUDITOR OF STATE.

MANSLAUGHTER.

See CRIMINAL LAW, 6, 23.

MARRIED WOMAN.

See CONTRACT, 10; CONTRIBUTION, 2; FRAUDULENT CONVEYANCE, 1, 2; PROMISSORY NOTE, 2.

MASTER AND SERVANT.

See NEGLIGENCE, 6.

MEASURE OF DAMAGES.

See MALICIOUS PROSECUTION, 5.

MECHANIC'S LIEN.

See CONTRACT, 2.

MERGER.

See CONTRACT, 1; CRIMINAL LAW, 15; REPLEVIN, 3.

MINOR.

See INTOXICATING LIQUOR, 3.

MISJOINDER.

See SUPREME COURT, 23.

MISPRISION.

See JUDGMENT, 5.

MISTAKE.

See JUDGMENT, 5; MORTGAGE, 5, 6, 8 to 10; PROMISSORY NOTE, 6.

MORTGAGE.

See CONTRACT, 5; CONTRIBUTION; FRAUDULENT CONVEYANCE, 2; INSURANCE, 2; PROMISSORY NOTE, 2, 4 to 6; SUBROGATION; TAXES, 5; VOLUNTARY ASSIGNMENT, 2; VOLUNTARY PAYMENT, 1.

1. *Description of Real Estate.*—A description of real estate in a mortgage, that may be rendered certain by averment, is not void for uncertainty. *Pence* v. *Armstrong, 191*

2. *Same.*—In describing a parcel of land as being north of the "ground of the C. C. C. & I. R. R." the use of the word "ground," instead of the words "right of way," does not render such description void. *Ib.*

3. *Replevin Bail.—Subrogation.*—A replevin bail upon a judgment recovered upon a note secured by a mortgage, when compelled to pay the judgment, is entitled to be subrogated to all of the rights of the mortgagee under the mortgage. *Ib.*

4. *Same.—Foreclosure.*—Such bail is not compelled to exhaust the property of the judgment debtor by execution before he can foreclose such mortgage. *Ib.*

5. *Same.—Mistake in Description.—Reformation as Against Subsequent Bona Fide Purchaser.*—A mortgage which fails to describe the land intended to be mortgaged can not be reformed and foreclosed against a subsequent *bona fide* purchaser, but may be against a subsequent purchaser with notice of the mistake. *Ib.*

6. *Same.—Notice.*—A mortgage which contains a defective description may be reformed and foreclosed against a subsequent purchaser for value, without actual notice, as the description may be rendered certain by averments, and such descriptions are not void, but are sufficient to put all purchasers upon inquiry and thus to charge them with notice. *Ib.*

7. *Same.*—The fact that the mortgagor, at the rendition of the judgment, owned a large amount of other real estate upon which it became a lien, does not preclude such bail from foreclosing the mortgage, nor does the fact that a third party, to whom a portion of such land was conveyed, agreed to pay the judgment, prevent the foreclosure of such mortgage, as these remedies are merely cumulative, and neither is dependent upon the enforcement of the other. *Ib.*

8. *Mistake.—Misdescription in Mortgage, Foreclosure and Sheriff's Deed.—Lien.*—A description in a mortgage, carried forward into a decree of foreclosure, and recited in a sheriff's deed, reading "the south part," etc., is wholly insufficient; and if, in the foreclosure, no personal judgment be rendered for the mortgage debt, the latter is no lien on such land. *Armstrong* v. *Short, 326*

9. *Same.—No Reforming Mistake of Law.*—Where such description is not a mistake of fact, *i. e.*, was just as the parties intended it to be, there can be no reformation. *Ib.*

10. *Same.—Mistake of Fact.*—Foreclosure and sale of land misdescribed are no bar to a subsequent action for reformation, if the misdescription was a mistake of fact. *Ib.*

11. *Assignment.—Recording.—Notice.*—Prior to July 2d, 1877, R. S. 1881, section 1093, there was no law authorizing the record of the assignment of a mortgage, and such record, if made, would not have been notice to subsequent purchasers or mortgagees in good faith. *Reeves* v. *Hayes, 521*

12. *Same.—Release.—Priorities.*—After assigning the debt secured thereby, a mortgagee has no power to enter satisfaction of a mortgage, and such entry of satisfaction by him on the margin of the record in the manner provided by statute, R. S. 1881, section 1090, will not give

priority to a subsequent mortgagee in good faith without actual notice of the assignment of the debt. *Ib.*

MOTIVE.

See INSURANCE, 3.

MUNICIPAL CORPORATION.

See CONTRACT, 2 to 3; TOWN.

MURDER.

See CRIMINAL LAW, 6, 23.

NAME.

See CRIMINAL LAW, 13.

NEGLIGENCE.

See COUNTY COMMISSIONERS, 3; JUSTICE OF THE PEACE, 1; MALPRACTICE; RAILROAD, 2, 4; SALE, 3, 4; TELEGRAPH, 5, 6.

1. *Railroads.—Wilful Injury.*—Gross negligence is not, as a matter of law, wilfulness; and, in a suit against a railroad company, for an injury resulting from such negligence, recklessness or wantonness, contributory negligence on the part of the plaintiff is a defence.
Terre Haute, etc., R. R. Co. v. *Graham, 286*

2. *Excavation.*—When the public have by permission travelled on foot for years over an open city lot, it is the duty of the owner, upon making an excavation in the pathway, with a view to erecting a building, to put some guard or warning for public protection, and a failure to do so gives a right of action to one who, without fault, is injured thereby.
Graves v. *Thomas, 361*

3. *Same.—Evidence.*—In such case evidence showing such public use of the pathway is admissible. *Ib.*

4. *Same.—Damages.*—In such case evidence that the person injured was poor and depended on labor for support may be admissible, as tending to prove that cessation from labor after the injury was caused by the injury. *Ib.*

5. *County Commissioners.—Liability.—Unsafe Bridges.—Statute Construed.*—The act of March 2d, 1883, "concerning highways and supervisors thereof," Acts 1883, p. 62, does not relieve boards of county commissioners of any responsibility formerly devolving upon them in regard to unsafe or defective bridges. *Board, etc.,* v. *Emmerson, 579*

6. *Pleading.—Justice of the Peace.—Complaint Against Railroad Company for Killing Stock.*—A complaint before a justice of the peace against a railroad company, averring that, on, etc., at, etc., the defendant's servants wilfully and negligently, and without any fault of the plaintiff, ran its cars upon plaintiff's mare, whereby, etc., is sufficient after verdict. *Pennsylvania Co.* v. *Rusie, 236*

7. To authorize a recovery for an injury caused by negligence, a case of unmixed negligence must be shown. There can be no recovery if it appear that the plaintiff, by want of ordinary care and prudence, contributed to the injury, or if, by the exercise of ordinary care, he might have prevented it. *Terre Haute, etc., R. R. Co.* v. *Graham, 286*

NEW TRIAL.

See CRIMINAL LAW, 9, 16; JUDGMENT, 1, 2, 5; PRACTICE, 2; SUPREME COURT, 15, 25; TRESPASS, 1; VERDICT, 5.

1. *Motion and Reasons.*—A motion for a new trial is not complete until the written reasons therefor are filed. *Secor* v. *Souder, 95*

2. *Same.—Reasons Filed too Late.—Record.—Supreme Court.*—Where a decision is rendered on the last day of a term of court, and a motion for a new trial then made, but the written reasons are not filed until after the first day of the next term, it is not in time and no question raised by such motion and reasons can be presented to the Supreme Court, on appeal. *Ib.*

3. *Instructions.—Motion for New Trial.*—Neither an instruction to the jury nor instruments of evidence can be made part of the record by merely referring thereto in a motion for a new trial. *Bradway* v. *Waddell, 170*

4. *Supreme Court.—Evidence Excluded.—Practice.*—Where alleged error in the exclusion of evidence is not made a cause in the motion for a new trial, it can not be considered by the Supreme Court on appeal. *Pratt* v. *Allen, 404*

NOTARY PUBLIC.

Seal Need not Contain Name of County.—The seal of a notary public attesting an affidavit made before him need not contain the name of the county where the notary resides or for which he was appointed. *Lange* v. *State, 114*

NOTICE.

See COUNTY COMMISSIONERS, 1; DRAINAGE, 1, 7; HIGHWAY, 4; MORTGAGE, 5, 6, 11, 12; PARTITION, 4; PRINCIPAL AND AGENT, 3, 4; PROMISSORY NOTE, 5.

NOVATION.

Partnership.—At the instance of some of its creditors, an insolvent partnership was dissolved and a receiver appointed. While the concern was solvent, it became indebted to one of its members by notes, which he surrendered and took new notes, payable to his daughter, and handed them to her as an advancement. She afterwards assigned these to her step-mother, the wife of the creditor partner, for a consideration from him. There was no fraud, and after the insolvency the latter obtained a judgment upon them, and presented it for allowance out of the assets in the hands of the receiver.

Held, that there was a novation by the substitution of the daughter as creditor of the firm, and that her assignee was not to be regarded as assignee of the notes surrendered, and, therefore, the judgment should be allowed as a general debt of the partnership. *Parsons* v. *Tillman, 452*

OFFICE AND OFFICER.

See AUDITOR OF STATE; CORPORATION; COUNTY COMMISSIONERS; COUNTY SUPERINTENDENT; CRIMINAL LAW, 12; FALSE IMPRISONMENT; HIGHWAY, 3, 4; JUSTICE OF THE PEACE; SHERIFF; STATUTE OF LIMITATIONS; TOWN, 1.

PARENT AND CHILD.

See DESCENTS.

PARTIES.

See CONTRACT, 3, 4, 10; DRAINAGE, 7; GRAVEL ROAD, 1; GUARDIAN AND WARD, 2; HIGHWAY, 6 to 8; JUDGMENT, 5; PARTITION, 4; PRACTICE, 16; SHERIFF, 4; SUPREME COURT, 5, 23; TRUST AND TRUSTEE, 2; VOLUNTARY ASSIGNMENT, 1.

PARTITION.

See WILL, 3.

1. *Will.—Copy.—Pleading.—Several Defences can not be Pleaded Jointly.*—In an action for the partition of real estate, the several defendants answered jointly, alleging title in one of them only under a certain will, made part of the answer by copy.

Held, on demurrer, that the will was not the foundation of the defence, but

only evidence; and that, as the answer showed title in only one of the defendants, it was insufficient as a joint answer.
Black v. *Richards*, *184*

2. *Same.—Joint Will by Owners in Common.*—Owners in common may dispose of their common property by a joint will, and, upon the death of both, leaving the will unrevoked, it can be admitted to probate. *Ib.*

3. *Same.—Uncertainty of Description.—Evidence.*—A will, attempting to devise real estate, described it as follows: "The west half of the southwest fr., section (19) nineteen, township (22), range (1 W.), contain (72) seventy-two and (40) hundredths acres," but it did not name the state or county, nor whether the township was "north" or "south."

Held, that, under the modern rule, that the thing devised may be identified by parol evidence, the will is not void for mere uncertainty of description. *Ib.*

4. *Proceeding In Rem.—Parties.—Notice.*—An action for the partition of real estate is a proceeding *in rem*, and all persons having an interest in the property, either as owner or lien-holder, at the commencement of the suit, are proper parties to such proceeding, and all persons dealing with the property, *pendente lite*, are affected with notice of the orders and proceedings had therein and are bound thereby.
Edwards v. *Dykeman*, *509*

5. *Same.—Receiver.—Sale of Property.—Delivery of Possession to Purchaser.—Attachment or Writ of Possession.*—Pending a suit for partition, the court may, upon a proper showing, appoint a receiver to take possession and care of the property, collect rents, etc.; and where the proceedings result in the sale of the property, the court may order the delivery of possession to the purchaser, and may enforce such order by an attachment against the person upon a rule to show cause and an insufficient showing, or by writ of possession. *Ib.*

PARTNERSHIP.

See EVIDENCE, 4.

Novation.—At the instance of some of its creditors, an insolvent partnership was dissolved and a receiver appointed. While the concern was solvent, it became indebted to one of its members by notes, which he surrendered and took new notes, payable to his daughter, and handed them to her as an advancement. She afterwards assigned these to her step-mother, the wife of the creditor partner, for a consideration from him. There was no fraud, and after the insolvency the latter obtained a judgment upon them, and presented it for allowance out of the assets in the hands of the receiver.

Held, that there was a novation by the substitution of the daughter as creditor of the firm, and that her assignee was not to be regarded as assignee of the notes surrendered, and, therefore, the judgment should be allowed as a general debt of the partnership. *Parsons* v. *Tillman*, *452*

PAYMENT.

See CONTRACT, 6; DECEDENTS' ESTATES, 8; PROMISSORY NOTE, 2, 4; REPLEVIN, 1; TAXES, 6; TELEGRAPH, 3; VOLUNTARY PAYMENT.

PENALTY.

See TELEGRAPH; TOWN, 2.

PERFORMANCE.

See CONTRACT, 5 to 7, 9, 14; INSURANCE, 2.

PERSONAL INJURY.

See NEGLIGENCE.

PERSONAL PROPERTY.

See CONTRACT, 15 to 17; DECEDENTS' ESTATES, 1; DESCENTS; REPLEVIN; SALE; SHERIFF'S SALE, 3; TAXES, 4.

PHYSICIAN AND SURGEON.

See MALPRACTICE; SLANDER, 2.

PLEADING.

See ASSAULT AND BATTERY; CONTRACT, 2 to 8, 10, 11, 17; CORPORATION; COUNTER-CLAIM; COUNTY COMMISSIONERS, 2, CRIMINAL LAW, 1, 7, 8, 11; DECEDENTS' ESTATES, 1, 5, 8, 9; DIVORCE; DRAINAGE, 1 to 4; INTOXICATING LIQUOR, 3; INSURANCE, 2; JUDGMENT, 2; JUSTICE OF THE PEACE; LIBEL; NEGLIGENCE, 6; PARTITION, 1; PRACTICE, 7, 9, 10; PROMISSORY NOTE, 2, 3; RAILROAD, 2, 4; REAL ESTATE, ACTION TO RECOVER; SALE, 1; SHERIFF, 1; SHERIFF'S SALE, 2; SLANDER, 5 to 9; TAXES, 4, 7; TELEGRAPH, 3, 4; TOWN, 1; WILL, 3.

1. *Supplemental Complaint.*—Under section 399, R. S. 1881, a supplemental complaint is neither an amended complaint nor a substitute for the original complaint; but it is a further complaint, which, assuming that the original complaint is to remain in the record, alleges new facts which have occurred after the filing of such original complaint.
Davis v. *Krug*, *1*

2. *Harmless Error.*—There is no available error in sustaining a demurrer to a paragraph of answer, all the material averments of which may be proved under another paragraph upon which issue is joined.
Johnson v. *Putnam*, *57*

3. *Argumentative Averments.*—If the necessary facts appear in a pleading argumentatively only, it will resist a demurrer. *Barkley* v. *Mahon*, *101*

4. *Insufficient Complaint.—Bad Answer.—Demurrer.*—Where the complaint is insufficient, it is immaterial whether a paragraph of answer is or is not sufficient to withstand a demurrer, for a bad answer is good enough for a bad complaint. In such case, where the plaintiff appeals, intervening errors are harmless, and the judgment must be affirmed.
Clawson v. *Chicago, etc., R. W. Co.*, *152*

5. *Practice.—Amending Pleading Waives Ruling on Demurrer.*—Error in sustaining a demurrer to a pleading is waived by amending the pleading.
Petty v. *Trustees, etc.*, *278*

6. *Same.—Answer to Whole Complaint Bad as to One Paragraph.*—An answer to the whole of a complaint containing several paragraphs must, to withstand a demurrer, be sufficient as to each paragraph. *Ib.*

7. *Practice.*—If one of several paragraphs of a complaint be good, there is no error in overruling a demurrer to the whole complaint.
Poland v. *Miller*, *387*

8. *Motion.—Demurrer.—Assignment of Error.*—A motion for the issue of a writ is not a complaint, nor is it the subject of a demurrer; and after a hearing had and a decision made in favor of the moving party, the sufficiency of such a motion can not be called in question, for the first time, by an assignment of error in the Supreme Court.
Edwards v. *Dykeman*, *509*

9. Where the general averments of the complaint show that the claim is due and unpaid, the complaint is sufficient without averring such facts in terms. *Aughie* v. *Landis*, *419*

10. *Counter-Claim.—Cross Complaint.*—A counter-claim very closely corresponds to the cross bill of the chancery practice, but is more comprehensive, in that it includes recoupment.
Standley v. *Northwestern, etc., Ins. Co.*, *254*

11. *Same.—What Matters may be Pleaded.*—A counter-claim can only be grounded on matters growing out of or connected with the cause of action, and a matter constituting an entirely distinct cause of action, not connected with the matters stated in the complaint, can not be pleaded as a counter-claim. *Ib.*

12. *Same.*—For a very full discussion of the question, as to what is a counter-claim, see opinion. *Ib.*

13. *Complaint After Verdict.*—A complaint will be sustained after verdict when it contains statements from which by fair intendment, a cause of action may be inferred. *Murphy* v. *Murphy, 430*

14. *Practice.—Uncertainty in Pleading.—Demurrer.*—Uncertainty in a pleading is not presented by a demurrer, unless the uncertainty be such that no cause of action is stated. *Moorman* v. *Shockney, 88*

15. *Same.—Motion to Make More Specific.*—Uncertainty in a pleading should be presented by a motion that the pleading be made more specific. *Ib.*

16. Overruling a demurrer to a bad answer, the complaint being good, is error. *Epperson* v. *Hostetter, 583*

POSSESSION.

See PARTITION, 5; SHERIFF, 4.

PRACTICE.

See APPEAL BOND; BILL OF EXCEPTIONS; CONTRACT, 4; COSTS; CRIMINAL LAW, 9, 16 to 19, 22; DEMURRER TO EVIDENCE; DRAINAGE, 5; HIGHWAY, 1, 7; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; JUDGMENT, 1, 2, 5; NEW TRIAL; PARTITION, 5; PLEADING, 2, 4 to 8, 16; REPLEVIN, 2; SPECIAL FINDING; SUPREME COURT; TRESPASS, 1; VERDICT.

1. *Dismissal.—Withdrawal of Evidence.*—When a complaint is in two paragraphs, the plaintiff may, upon the trial, dismiss as to one of the paragraphs, and withdraw all evidence which concerns only that paragraph, but he can not, without consent, withdraw any evidence which concerns the paragraph not dismissed. *Reynolds* v. *Linard, 48*

2. *New Trial.—Assignment of Error.—Limiting Argument of Counsel.*—Error in limiting the length of an argument is cause for a new trial, but not for an assignment of error. *Baldwin* v. *Burrows, 81*

3. *Same.—Judicial Discretion.*—The power to limit argument is in the discretion of the trial court, and limitation to twenty minutes in an action involving but $60 can not be said by the Supreme Court to be erroneous, in the absence of a showing in the record to the contrary. *Ib.*

4. *Uncertainty in Pleading.—Demurrer.*—Uncertainty in a pleading is not presented by a demurrer, unless the uncertainty be such that no cause of action is stated. *Moorman* v. *Shockney, 88*

5. *Same.—Motion to Make More Specific.*—Uncertainty in a pleading should be presented by a motion that the pleading be made more specific. *Ib.*

6. *Excusing Juror.*—The action of the court in excusing a competent juror is a matter very much in its discretion, and no error is committed where no injury results. *De Pew* v. *Robinson, 109*

7. *Same.—Amending Complaint After Trial.—Variance.*—It is not error to permit the plaintiff to so amend his complaint as to conform to the evidence, where the defendant has not been misled by the erroneous averment. *Smith* v. *Flack, 116*

8. *Same.—Pleading Rejected.—Bill of Exceptions.—Supreme Court.*—Additional pleadings were tendered for filing after issues had been fully formed, were rejected and exception taken, but no time given to prepare and file a bill of exceptions; the party complaining incorporated

them at a subsequent term in a bill of exceptions containing alleged error in refusing a new trial.

Held, that such pleadings are not in the record. *Ib.*

9. *Harmless Ruling on Demurrer.—Supreme Court.*—Error in sustaining a demurrer to a paragraph of a pleading is not available, where the facts alleged therein are admissible in evidence under a remaining paragraph. *Moore* v. *Boyd*, *134*

10. *Pleading.—Supreme Court.*—Where the plaintiff's reply is tested by demurrer, and the demurrer is overruled, no effort being made by him to carry it back to the answer and no exception taken by him, the Supreme Court will not at his instance hold the answer bad. *Standley* v. *Northwestern, etc., Ins. Co.*, *254*

11. *Cross-Examination of Witness.—Discretion of Court.—Abuse of.*—A very wide latitude is necessarily allowable in the cross-examination of an adverse witness, and how far it may be extended, in any case, is a question largely in the discretion of the trial court; and unless there is manifest abuse of such discretion, its exercise will afford no sufficient ground for the reversal of the judgment. *Ledford* v. *Ledford*, *283*

12. *Failure to Answer Interrogatories.—Venire De Novo.—Waiver.*—Where neither motion nor objection is made on the ground that a jury has failed to return, with their general verdict, answers to interrogatories put to them, a *venire de novo* will not lie on that ground. *Jones* v. *Angell*, *376*

13. *Objections to Evidence.—Competency.*—Objections to the competency of evidence should clearly point out to the trial court the ground of the incompetency. *Ib.*

14. *Same.—Harmless Instruction.*—An instruction which, though abstractly erroneous, works no injury in the particular case wherein it is given, is harmless. *Ib.*

15. *Interrogatories.—Discretion of Court.*—The court may, but need not, in its discretion, receive interrogatories to be put to the jury, after the argument has begun. *Fleetwood* v. *Dorsey, etc., Co.*, *491*

16. *Striking out Names of Defendants.—Error.*—There is no available error in overruling the plaintiff's motion to strike out the names of defendants, upon the alleged ground that they have no interest in the subject of the suit, for, in that event, their presence as parties could not prevent the plaintiff from obtaining such relief, as he might be entitled to, against the other defendants. *Jussen* v. *Board, etc.*, *567*

17. *Appeal.—County Commissioners.—Trial de Novo.—Supreme Court.*—An appeal from the orders of a county board levying a tax in aid of a railroad goes to the circuit court for a trial *de novo*, and not for the correction of errors; and the action of the court in striking out objections filed there, in the nature of errors assigned, affords no grounds for the reversal of the judgment by the Supreme Court. *Ib.*

PRESUMPTION.

See DRAINAGE, 1; INSTRUCTIONS TO JURY, 6; INTOXICATING LIQUOR, 3; RAILROAD, 3, 4; REAL ESTATE, ACTION TO RECOVER; SUPREME COURT, 2, 7, 14; VERDICT, 3.

PRINCIPAL AND AGENT.

See CONTRACT, 12; NEGLIGENCE, 6.

1. *Purchase by Agent of Principal's Property at Sheriff's Sale.—Title.*—An agent employed to take care of and manage his principal's property can not acquire any title thereto by purchase at sheriff's sale, as against his principal, while such relation exists. *Fountain Coal Co.* v. *Phelps*, *271*

2. *Same.—Trust and Trustee.*—Such agent can not acquire title to such

property by such purchase without first severing such relation, and if any doubt exists as to his attitude, he will be deemed a trustee for his principal. *Ib.*

3. *Same.—Notice.—Burden of Proof.*—When such agent attempts to sever such relation by notice, the burden is upon him to show that his principal was notified of such altered relation. *Ib.*

4. *Same.—Acquiescence.—Ratification.*—A principal can not acquiesce in the purchase of his property by his agent until he knows that such purchase has been made, and the onus of showing it is upon the agent. *Ib.*

PRINCIPAL AND SURETY.

See CONTRACT, 3; SHERIFF, 1 to 3.

PRIORITY.

See EXECUTION; MORTGAGE, 12.

PROMISE.

See CONTRACT, 6.

PROMISSORY NOTE.

See CONTRACT, 15; CRIMINAL LAW, 7; DECEDENTS' ESTATES, 5; JUSTICE OF THE PEACE, 3; MALICIOUS PROSECUTION, 2; NOVATION; PARTNERSHIP; SALE, 5; SUBROGATION; WITNESS.

1. *Assignment.—Judgment.*—The assignment of a note, after it has been allowed as a claim against an estate, transfers nothing to the assignee. *Brown* v. *Darrah*, *86*

2. *Failure of Payee to Credit Payment.—Remedy of Maker, on Sale of Note.—Complaint.—Demand.—Husband and Wife.*—J., to obtain a loan from M., procured S. to execute to M. his promissory note, and then J. and his wife executed to S. their promissory note for the same amount secured by a mortgage on her land, which note and mortgage, endorsed by S., were delivered to M., together with the other note, both payable in bank, and both given solely to procure said loan. Certain payments made to M. by J. were endorsed on the individual note of S., but not on the other. S.'s note being surrendered to him, M. sold and endorsed the other note and the mortgage, for value and before maturity, to one who had no knowledge of such payments, and who procured judgment on the note and foreclosure of the mortgage. J. being insolvent, he and his wife sold and conveyed the mortgaged premises to the plaintiff, in payment of such judgment. J.'s wife then sued M. for the amount of such payments, alleging the foregoing facts.

Held, on demurrer, that such payments ought to have been endorsed on both notes by M., without request or agreement so to do; that it was not necessary to allege that M. knew the land was the wife's separate property, nor the price he had obtained for the note and mortgage, and that the complaint is good. *Moorman* v. *Shockney*, *88*

3. *Want of Consideration.—Pleading.*—In an action on a promissory note, a plea that, as to all in excess of a certain part of the note, it "was given without any consideration therefor," is sufficient. *Moore* v. *Boyd*, *134*

4. *New Note for Extension of Time Not Payment.*—The execution of a promissory note payable in a bank, in lieu of matured promissory notes given for the purchase-money of real estate, for the purpose of obtaining an extension of time, does not operate as a payment. *Reeder* v. *Nay*, *164*

5. *Same.—Mortgage and Vendor's Lien.—Purchaser with Notice.*—Where such notes were secured by a duly recorded mortgage on the real estate,

containing a stipulation for the payment of "the sum of money above secured," the mortgage may be foreclosed, and the vendor's lien enforced against the land in the hands of a purchaser from the mortgagor with notice of, and indemnified against, such unpaid purchase-money. *Ib.*

6. *Same.—Release of Mortgage.—Want of Consideration.—Mistake.*—Where, in such action, the defendant alleges that prior to his purchase the mortgagee had released such mortgage of record, it is no reply to allege that such release was made without consideration or by mistake. *Ib.*

7. *Consideration.—Receipt.*—Where, in a sale of land, the agent of the seller executes to the buyer a receipt for the amount of his commission, to operate as part payment of the purchase-money, a promissory note executed by the buyer to the agent, in consideration of such receipt, is valid. *Barcus* v. *Elliott*, *601*

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 12.

QUIETING TITLE.

See WILL, 3.

QUO WARRANTO.

See CORPORATION.

RAILROAD.

See CRIMINAL LAW, 8; JUSTICE OF THE PEACE, 1; NEGLIGENCE, 1, 6.

1. *Construction of.—Crossing Highway.—Change of Highway.—Appropriation.*—Under section 3915, R. S. 1881, a railway company may construct its railroad over or across a public highway, and, where an embankment or cutting occurs, may make a change in the line of such highway, if necessary or desirable, and may take such lands for the construction of such change of highway, as may be deemed requisite, by purchase or gift, or by appropriation.
Clawson v. *Chicago, etc., R. W. Co.*, *152*

2. *Killing Stock.—Failure to Fence.—Negligent Killing.—Counter-Claim.*—In an action against a railroad company, to recover for the value of a horse killed by the defendant's cars, wherein one paragraph of the complaint was based upon the defendant's failure to fence its track, and another alleged a negligent killing, the defendant could not set up, by way of counter-claim, that the plaintiff had negligently suffered his horse to stray upon the track, where the cars ran upon it, and were thrown from the track, causing the defendant great damage, for which judgment was demanded. *Terre Haute, etc., R. R. Co.* v. *Pierce*, *496*

3. *Same.—Presumption.*—See opinion for facts authorizing presumption of the killing of the animal by the defendant's cars. *Ib.*

4. *Same.—Venue.—Evidence.—Presumption.*—Where such action is based upon the failure of the company to fence, it must be brought in the county where the killing occurred, but when it is based upon alleged negligence, it may be brought in any county through which the railroad runs. If such action be based on both these grounds, the Supreme Court, in the absence of evidence of the venue, will presume that a general finding or verdict was based upon the paragraph alleging negligence. *Ib.*

5. *Same.—Railroad Aid.—Petition for Appropriation.*—Under the provisions of section 4045, R. S. 1881, a petition for an appropriation to aid in the construction of a railroad may be presented to the board of commissioners of the county, "at any regular or special session thereof."
Jussen v. *Board, etc.*, *567*

6. *Petition for Appropriation.—Uncertainty or Ambiguity.*—The levy of a tax to aid in the construction of a railroad is not vitiated, nor will it be avoided, by any uncertainty or ambiguity in the language of the petition for the appropriation, when it appears that no one was or could be deceived thereby, and that the intention of the petitioners could not be misapprehended. *Ib.*

7. *Same.—Sufficiency of Petition.—Subscription or Donation.*—The petitioners for an appropriation to aid in the construction of a railroad may designate, in their petition, whether the amount appropriated shall be donated to the railway company or invested in its capital stock, but their failure to make such designation will not vitiate the petition or any of the proceedings had thereon. *Ib.*

8. *Same.—Consolidated Company.*—The fact that the petition asks an appropriation to a certain railway company, "or its successor by consolidation," does not invalidate the petition or the proceedings thereon; but in such case, in the event of consolidation, the right to the appropriation will pass to and vest in the consolidated company. *Ib.*

9. *Proof of Venue.—Judicial Knowledge.*—Where, in an action against a railroad company for stock killed, facts are shown from which the court can judicially know that the injury was caused in the county where the action is brought, proof of the venue is sufficient. *Terre Haute, etc., R. R. Co.* v. *Pierce, 496*

10. *Trespasser.*—A railroad company is not liable for an injury to a trespasser upon its right of way, unless wilfully inflicted. *Terre Haute, etc., R. R. Co.* v. *Graham, 286*

RATIFICATION.

See PRINCIPAL AND AGENT, 4.

REAL ESTATE.

See CONTRACT, 5; CONTRIBUTION; DESCENTS; FRAUDULENT CONVEYANCE; HIGHWAY, 3, 4; JUDGMENT, 5; MORTGAGE; PARTITION; REAL ESTATE, ACTION TO RECOVER; REDEMPTION; SHERIFF'S SALE, 1; SUPREME COURT, 14; TAXES, 1 to 5, 8; VENDOR AND VENDEE; VOLUNTARY PAYMENT, 1; WIDOW; WILL.

REAL ESTATE, ACTION TO RECOVER.

See COSTS.

Description.—Complaint.—Assignment of Error.—Defects Cured.—Amendment.—Supreme Court.—Presumption.—Where, in an action affecting real estate, the description set out in the complaint is such as might have been amended in the trial court, and might have been made good by the evidence, the Supreme Court will presume in favor of the verdict, where the question as to such description is first made by an assignment of error attacking the complaint. *Reid* v. *Mitchell, 397*

RECEIPT.

See PROMISSORY NOTE, 7; TAXES, 8.

RECEIVER.

See PARTITION, 5; PARTNERSHIP; WILL, 3.

RECORD.

See BILL OF EXCEPTIONS; INTERROGATORIES TO JURY, 1; JUDGMENT, 1, 2; MALICIOUS PROSECUTION, 6; NEW TRIAL, 2, 3; SPECIAL FINDING, 1; SUPREME COURT, 2, 6, 12, 14, 17.

RECORDING WRITTEN INSTRUMENT.

See MORTGAGE, 11, 12.

REDEMPTION.

See CONTRACT, 5; CONTRIBUTION, 2; FRAUDULENT CONVEYANCE, 2; VOLUNTARY PAYMENT, 1,

1. Where the holder of a certificate of purchase receives the redemption money, the redemption is complete whether the person paying the money was legally entitled to redeem or not. *Pence* v. *Armstrong, 191*
2. *Same.—Purchaser of Certificate of Sale After Redemption.*—A purchaser of a certificate of sale after redemption can acquire no title through such certificate, though he had no notice of such redemption at the time of such purchase. *Ib.*
3. *Same.—Purchase for Benefit of Owner.*—Where the owner of the equity of redemption places means in the hands of another with which to redeem such property, and such other person thereafter purchases such certificate and transfers it to another, such purchase operates as a redemption of such property, and the last purchaser can not claim title through such certificate, though he had no notice of such redemption at the time his purchase was made. *Ib.*
4. *Statute Construed.—Junior Judgment Creditor.—Execution.—Sheriff.—Levy upon and Sale of Property Redeemed.—Rents and Profits.—Appraisement.—Bid and Bidder.*—Where real estate was sold in fee simple by the sheriff on execution, and was redeemed from such sale by a junior judgment creditor, while the redemption act of March 31st, 1879 (Acts 1879, p. 176), was in force, and where such junior judgment creditor and redemptioner has sued out an execution on his judgment, with the additional recitals therein as provided in section 5 of such act, it is the duty of the sheriff first to levy such execution upon and sell the property redeemed, and the same estate therein redeemed, and at such sale the execution creditor is a forced "bidder for his redemption money, with ten per cent. interest thereon, and all costs accrued since the redemption." In such case the rents and profits of the property redeemed can not be sold, and, therefore, the failure of the sheriff to cause an appraisement of such rents and profits will not vitiate or avoid his sale of the property redeemed. *Taylor* v. *Morgan, 456*

RELEASE.

See MORTGAGE, 12; PROMISSORY NOTE, 6.

RENTS AND PROFITS.

See PARTITION, 5; REDEMPTION, 4.

REPLEVIN.

1. *Plea of Payment, as Defence.—No Recovery for Over-Payment.*—In an action of replevin, an answer was filed alleging in detail purchase by instalments, and over-payment, and demanding judgment for the amount overpaid.

Held, on demurrer, that the answer was good as showing title in the defendant, but that he can not recover for the over-payment. *Baldwin* v. *Burrows, 81*

2. *Same.—General Verdict.—Venire de Novo.*—A general verdict for the defendant in a replevin suit is, as against the plaintiff, a finding on all the issues, and he can not question it by a *venire de novo*. *Ib.*
3. *Same.—Parol Contract Not Merged in Written where there is Fraud.—Evidence.*—Where, in replevin, the defendant claims title under a parol contract, while the plaintiff claims under a written contract of conditional sale which the defendant charges was procured by fraud, all the facts may be given in evidence to enable the jury to determine which of the contracts is valid. *Ib.*

REPLEVIN BAIL.

See MORTGAGE, 3, 4, 7; SUBROGATION.

RES ADJUDICATA.

See EVIDENCE, 4; HIGHWAY, 5.

RESCISSION.

See CONTRACT, 17; SALE, 7.

REVIEW OF JUDGMENT.

See JUDGMENT, 1, 2.

SALE.

See CONTRACT, 15 to 17; INTOXICATING LIQUOR; PARTITION, 5; PRINCIPAL AND AGENT; PROMISSORY NOTE, 2; REPLEVIN, 3; SHERIFF, 1; SHERIFF'S SALE; TAXES, 1 to 5.

1. *Warranty.—Breach of.—Complaint.*—A complaint for breach of warranty of the soundness of personal property sold is good without alleging that its defects were not open and visible. *Poland* v. *Miller*, 387
2. *Same.—Manufacture and Sale.*—The manufacture and sale of an article for a particular use implies a warranty that it is reasonably fit for that use, visible defects excepted, and the manufacturer is liable for such damages as result from a breach of the warranty, e. g., whiskey barrels, which by reason of defective material or cooperage, lose their contents. *Ib.*
3. *Same.—Damages.—Negligence.*—One who buys whiskey barrels of a manufacturer for the purpose of storing whiskey therein, with express warranty that they are fit for that purpose, and, without negligence, believing they are fit for the purpose, so used them, and by reason of defects loses the contents, may recover therefor in a suit for breach of warranty. *Ib.*
4. *Same.—Instruction.*—In such case it is not error to refuse to instruct that if the plaintiff's negligence contributed to his loss he can not recover. *Ib.*
5. *Contract.—Consideration.—Conditional Sale.—Promissory Note.*—A contract for the payment of money, showing the actual consideration to be an article of personal property, and stipulating that the purchaser's title is dependent upon such payment, will support a complaint thereon for recovery of the money. *Fleetwood* v. *Dorsey, etc., Co.*, 491
6. *Same.—Warranty.—Evidence.*—Evidence of a verbal warranty will not sustain a plea alleging a written warranty. *Ib.*
7. *Same.—Pleading.—Rescission.—Tender.*—In an action to recover for the price of an article sold, where the defence is a breach of warranty and rescission, the answer should allege either that the property had been tendered back, or that it was worthless. *Ib.*

SCHOOLS.

See COUNTY SUPERINTENDENT.

SCHOOL FUND MORTGAGE.

See TAXES, 5.

SEAL.

See CRIMINAL LAW, 3.

SET-OFF.

See INSTRUCTIONS TO JURY, 9.

SHERIFF.

See REDEMPTION, 4.

1. *Action on Bond.—Failure to Satisfy Execution.—Complaint.*—In an action by an execution plaintiff, on a sheriff's bond, for his failure to apply on the execution certain money made by sale of the debtor's property on simultaneous executions, the complaint, after setting out the bond, judgment, execution, levy and sale, alleged that the sheriff had "failed and refused to apply said money or any part thereof, toward the satisfaction of said execution," etc.

Held, on demurrer, that the averment quoted negatives the idea that such money had been paid to the clerk, and is sufficient.

State, ex rel., v. *Cisney*, *265*

2. *Same.—Evidence.—Harmless Error.*—Where, in such action, his returns show that several of the executions came to his hand at one time, and the others at a subsequent time, it is not competent, and it would be no defence, for him to prove that, in fact, all of such executions came to him successively, as thus issued, but error in admitting such proof, being in favor of the plaintiff, is one of which the latter can not be heard to complain. *Ib.*

3. *Same.—Contradicting Return.*—A sheriff may not, but others than his sureties may, contradict such returns. *Ib.*

4. *Parties.—Trespass.—Attachment.*—When personal property seized by the sheriff by virtue of a writ of attachment is forcibly taken from his possession, the sheriff only can sue therefor. *Dufour* v. *Anderson*, *302*

5. *Service of Summons.—Sheriff's Return.—Default.*—Where the sheriff's return to the writ of summons fails to show that it has been served on the defendant, or, under section 309, R. S. 1881, upon some one as the agent of the defendant, the plaintiffs are not entitled to a default against such defendant. *Wright* v. *Mack*, *332*

SHERIFF'S SALE.

See MORTGAGE, 8 to 10; PRINCIPAL AND AGENT, 1, 2; REDEMPTION, 4; VOLUNTARY PAYMENT, 1.

1. *Execution.—Exemption.—Evidence.—Life-Estate.—Appraisement.—Copy Sheriff's Certificate.*—Suit by an execution defendant to set aside a sheriff's sale of real estate upon the ground that the sheriff had, on proper schedule and proceedings, set apart the same as exempt from execution.

Held, that without proof that the property had been set apart as alleged the evidence was not sufficient.

Held, also, that the schedule made in such case and delivered to the sheriff, describing the property as "a life-estate in a house and two lots in the city of Huntington, Indiana," and being verified by oath showing that the party owned no other real estate, was sufficient, and admissible evidence for the plaintiff.

Held, also, that the execution, advertisement and appraisement of the property scheduled were proper evidence for the plaintiff.

Held, also, that a mere copy of the sheriff's certificate of sale was not proper evidence for the plaintiff; but on proper notice to produce the original to be used as evidence, and failure, parol evidence of its contents would have been admissible.

Held, also, that parol evidence to show that the property was in fact appraised, and to identify it as the same lots described by numbers in the complaint, was admissible for the plaintiff. *Barkley* v. *Mahon*, *101*

2. *Same.—Pleading.*—When an officer sells property set apart as exempt from execution, the facts justifying such sale must be specially pleaded by him. *Ib.*

3. *Personal Property.—Sale on Execution.—Subject to View.—Lots and Parcels.*—Under section 751, R. S. 1881, personal property can not be sold on execution, unless it is present and subject to the view of those at-

tending the sale, and it must be sold at public auction, in such lots and parcels as are calculated to bring the highest price.
Wright v. *Mack*, *332*

SLANDER.

See LIBEL.

1. *Words Actionable Per Se.*—Where one person charges another with being "an abortionist," the language is actionable *per se*.
DePew v. *Robinson*, *109*

2. *Same.—Physician.*—Language imputing to a physician ignorance and malpractice in his profession is actionable *per se*. *Ib.*

3. *Same.—Evidence.—Mitigation of Damages.*—In an action of slander, similar torts on the part of the plaintiff against the defendant can not be proved in mitigation of damages. *Ib.*

4. *Same.—Malice.—Punitive Damages.*—Where slanderous language is uttered with malice in fact, the plaintiff's recovery is not limited to compensatory damages. *Ib.*

5. *Same.—Averment of Special Damages.*—Where language is actionable *per se*, the plaintiff need not allege special damages in order to recover more than nominal damages. *Ib.*

6. *Actionable Words.—Complaint.*—Words not made actionable by statute and which do not charge a crime are not actionable *per se*.
Rock v. *McClarnon*, *415*

7. *Same.*—The words "C. R. * * got drunk and came home with some powders and tried to get his wife to take them, but she refused, and sent for Dr. T., and he * * said that they were arsenic and poison, and if she had taken any of them they would have killed her—C. R. tried to poison his wife," are not actionable where there is no colloquium showing extrinsic matter which would give words a meaning not expressed by them alone. *Ib.*

8. *Same.—Innuendo.*—An innuendo in a complaint for slander does not enlarge the meaning of the words charged to have been spoken. *Ib.*

9. *Same.*—A complaint in slander which does not give the slanderous words spoken, but only the effect of them, is bad. *Ib.*

SPECIAL FINDING.

1. *Conclusions and Exception.*—Special findings, conclusions of law thereon, and exceptions to such conclusions become part of the record by being entered in the order book, without a bill of exceptions.
Secor v. *Souder*, *95*

2. *Defect in Special Finding.—Venire De Novo.—Exception.*—A defect in a special finding can be reached by a motion for a *venire de novo*, but not by an exception to the conclusions of law. *Williams* v. *Osborn*, *347*

SPECIAL VERDICT.

See VERDICT.

SPECIFIC PERFORMANCE.

See INSURANCE, 2.

STATUTE CONSTRUED.

See COUNTY COMMISSIONERS, 3; COUNTY SUPERINTENDENT; CRIMINAL LAW, 4, 5, 9; REDEMPTION, 4; TELEGRAPH, 2, 3.

STATUTE OF FRAUDS.

See CONTRACT, 18; DECEDENTS' ESTATES, 1.

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 4, 9; TAXES, 1, 2; TRUST AND TRUSTEE, 1.

1. *Over-payment by County Treasurer.—Limitation of Six Years.*—The six years statute of limitations is a good defence, in bar, to an action by

a former county treasurer, against the board of commissioners, on account, for money overpaid by him as treasurer, through mistake.
Schultz v. *Board, etc.*, *323*

2. *Same.—When Statute Begins to Run.*—The statute begins to run in such case from the date of the mistaken over-payment, and not from the discovery thereof. *Ib.*

3. *Tax Sale.—Limitation of Fifteen Years.—Statute Runs from Right to Deed and not from Date.*—An action to enforce a lien acquired upon land by purchase thereof at tax sale is barred if not commenced within fifteen years after the right of action accrues, and such right of action accrues and the statute begins to run, not from the date of the tax deed, but at the time when the purchaser becomes entitled to his deed, and delay in obtaining such deed does not extend the time.
Montgomery v. *Aydelotte*, *144*

4. To a claim upon an account against an intestate's estate, a plea that the cause of action did not accrue within six years before bringing the action, is insufficient. *Epperson* v. *Hostetter*, *583*

STREET.

See CONTRACT, 2, 10; NEGLIGENCE, 2 to 4.

SUBROGATION.

See DECEDENTS' ESTATES, 2 to 4; MORTGAGE, 3, 4, 7.

1. *Assignee of Judgment on Note Secured by Mortgage.—Replevin Bail.*—The assignee of a judgment, recovered upon a note secured by a mortgage, acquires by his purchase the mortgage, and bail upon the judgment upon payment is subrogated to all the rights of the assignee under said mortgage. *Pence* v. *Armstrong*, *191*

2. *Same.*—Where A. holds two mortgages upon the same land, and the note secured by the senior mortgage is put into judgment, the judgment transferred, replevin bail entered and the judgment afterwards paid by the bail, such bail is entitled to be subrogated to all the rights of the assignee of such judgment against all persons claiming through the mortgagee under the junior mortgage. *Ib.*

SUBSCRIPTION.

See CONTRACT, 6 to 8.

SUMMONS.

See SHERIFF, 5.

SUPERVISOR.

See HIGHWAY, 3, 4.

SUPREME COURT.

See BILL OF EXCEPTIONS; CONTRACT, 4; COSTS; CRIMINAL LAW, 12, 14; DRAINAGE 5; GUARDIAN AND WARD, 1; INSTRUCTIONS TO JURY, 2, 11; INTERROGATORIES TO JURY, 1; JUDGMENT, 1, 2; NEW TRIAL, 2, 3; PLEADING, 2, 4, 8; PRACTICE, 3, 8 to 11, 17; RAILROAD, 4; REAL ESTATE, ACTION TO RECOVER; TRESPASS, 1.

1. *Law of the Case.—Former Appeal.—Point in Judgment.*—Where there is a second appeal, the points in judgment, the questions which were before the court and *decided*, on the former appeal, will not be re-heard or re-examined by the Supreme Court on such second appeal, but will be adhered to as "the law of the case." But this rule will not preclude the Supreme Court from considering and deciding, on the second appeal, any questions which might have been, but were not, considered and decided as the case was presented on the former appeal.
Davis v. *Krug*, *1*

2. *Appeal.—Complete Record.—Duty of Appellant.*—Upon an appeal to the Supreme Court, it is the duty of the appellant to produce and file therein a complete transcript of the record, or so much thereof as will clearly show the error of which he complains; otherwise the presumption will prevail that no such error exists. *Fellenzer* v. *Van Valzah*, *128*

3. *Harmless Error.—Evidence.*—The admission of improper evidence, which it affirmatively appears did not affect the verdict, is a harmless error and not available in the Supreme Court. *Logansport* v. *Carroll*, *156*

4. *Filing Brief.—Dismissal.*—Where an appellant fails to file a brief within sixty days after the submission of the cause, the appeal will be dismissed. *Shulties* v. *Keiser*, *159*

5. *Same.—Co-Parties.—Jurisdiction.*—Where the appellant's co-party does not appeal and is not named as an appellant, nor notified of the appeal, the same must be dismissed, as the court has no jurisdiction of the cause. *Ib.*

6. *Bill of Exceptions.—Record.—Evidence.*—The evidence, when embodied in a bill of exceptions duly signed and filed, forms part of the record, no matter by whom it was taken down at the trial. *Bradway* v. *Waddell*, *170*

7. *Waiver of Error.*—Errors assigned and not discussed will be assumed not to exist. *Peoria, etc., R. W. Co.* v. *Flicker*, *180*

8. *Instructions.*—An instruction will be reviewed in connection with others given, and, thus considered, if the law be correctly stated, there is no error. *Pennsylvania Co.* v. *Rusie*, *236*

9. *Finding.—Sufficiency of Evidence.*—Where the evidence tends to sustain the finding of the trial court on the only point in controversy, it will not be disturbed by the Supreme Court. *Union, etc., Ins. Co.* v. *Abbott*, *238*
Louisville, etc., R. W. Co. v. *Zink*, *345*

10. *Finding.—Weight of Evidence.*—Where the evidence is conflicting, the finding of the trial court will not be disturbed by the Supreme Court upon the mere weight of evidence. *Keesaer* v. *Brooks*, *252*
Hudson v. *Wells*, *402*

11. *Instructions.—Harmless Error.—Verdict.—Evidence.*—Where the verdict is in accordance with the evidence, and just and right upon the merits, it will not be disturbed by the Supreme Court, on account of error in the instructions. *Ledford* v. *Ledford*, *283*

12. *Instruction.—Evidence.—Record.*—Where the evidence is not in the record, rulings in giving or refusing instructions are not ground for reversal, if upon any supposable state of the evidence under the issues the rulings would have been correct. *New* v. *New*, *366*

13. *Same.—Harmless Error.*—The Supreme Court will not reverse a judgment for error in giving or refusing instructions, where the verdict is clearly right upon the evidence. Nor will the Supreme Court reverse a judgment unless material and substantial error is shown. *Ib.*

14. *Record.—Title to Real Estate.—Presumption.*—Where, on appeal to the Supreme Court, the record does not contain the answer and all the evidence, that court can not determine whether the title to real estate was in issue, and must presume that the judgment below was right. *Mackison* v. *Clegg*, *373*

15. *Evidence Excluded.—New Trial.—Practice.*—Where alleged error in the exclusion of evidence is not made a cause in a motion for a new trial, it can not be considered by the Supreme Court on appeal. *Pratt* v. *Allen*, *404*

16. *Same.—Brief.*—See opinion for a brief held not to comply with the rule of the Supreme Court. *Ib.*

17. *Change of Judge.—Change of Venue.—Affidavits and Counter Affidavits.—*

Bill of Exceptions.—Error.—Where applications are made to the trial court for either a change of judge or a change of venue from the county, the affidavits and counter affidavits filed in connection therewith must be made parts of the record by a bill of exceptions, or the rulings thereon will not constitute such errors as can be considered by the Supreme Court. *Siebert* v. *State*, *471*

18. *Instructions.*—Where the instructions given are not in the record, alleged error in refusing instructions asked is not available.
Fleetwood v. *Dorsey, etc., Co.*, *491*

19. *Informal Demurrer.*—Where it appears from the record that the parties and trial court understood a certain demurrer to be addressed to a certain pleading to question its sufficiency, the Supreme Court, on appeal, will so regard the demurrer, notwithstanding it may have been informal. *Terre Haute, etc., R. R. Co.* v. *Pierce*, *496*

20. *Evidence.—Harmless Error.*—Where a material fact is established by competent and uncontradicted evidence, the Supreme Court will not reverse the judgment because some incompetent evidence was admitted on the same point. *Ib.*

21. *Same.—Judicial Notice.—Venue.—Evidence.*—The Supreme Court takes judicial cognizance of county boundaries, and that a certain distance from a place named in a county is within that county. *Ib.*

22. *Weight of Evidence.*—The Supreme Court will not award a new trial on the mere weight of evidence. *Terre Haute, etc., R. W. Co.* v. *Jackson*, *594*

23. *Assignment of Error.—Misjoinder in Error.*—An assignment of error jointly by several appellants, showing error against one of them only, presents no question to the Supreme Court. *Boyd* v. *Pfeifer*, *599*

24. *Bill of Exceptions.—All the Evidence.—Finding.—Weight of Evidence.*—The bill of exceptions must show affirmatively that it contains all the evidence, given on the trial, or the Supreme Court will not consider or determine any question which depends upon the evidence for its proper decision, and the finding or verdict will not be disturbed, in any case, merely upon the weight of the evidence.
Fellenzer v. *Van Valzah*, *128*

25. *New Trial.—Separation of Jury.*—In a criminal case the separation of the jury after retirement to deliberate, unattended by an officer, without leave of court, though made a cause for new trial by statute, R. S. 1881, section 1842, yet, in view of section 1891, the Supreme Court can not reverse on that ground where it affirmatively and clearly appears that the substantial rights of the defendant suffered no injury; but if in such case there be a doubt of guilt from the evidence, or whether the jury were tampered with, it will reverse. *Riley* v. *State*, *446*

26. *Evidence.*—Where the court below hears evidence on a motion for a new trial on account of the misconduct of a juror, the Supreme Court will not weigh the evidence. *Long* v. *State*, *481*

27. *Assignment of Error.—Amount of Recovery.*—A specification of an assignment of error that the complaint on a note does not state facts sufficient raises no question as to the recovery of any particular rate of interest. *Zotter* v. *Lawrence*, *346*

TAXES.

See RAILROAD, 5 to 8.

1. *Tax Sale.—Limitation of Fifteen Years.*—An action to enforce a lien acquired upon land by purchase thereof at tax sale is barred if not commenced within fifteen years after the right of action accrues.
Montgomery v. *Aydelotte*, *144*

2. *Same.—Statute Runs from Right to Deed and not from Date.*—Such right of action accrues and the statute begins to run, not from the date of

the tax deed, but at the time when the purchaser becomes entitled to his deed, and delay in obtaining such deed does not extend the time. *Ib.*

3. *Same.—Taxes Subsequently Paid Relate Back.*—All taxes subsequently paid, and the right of action therefor, relate back to the time when the purchaser became entitled to his deed. *Ib.*

4. *Complaint to Enjoin Sale of Land for.*—A complaint to enjoin the sale of lands for taxes, which shows that the taxes have been paid, and also that the former owner against whom the taxes were assessed had abundant personal property subject to distress and sale for the taxes, shows two good reasons for the injunction. *Logansport* v. *Carroll*, *156*

5. *Sale and Deed.—Title of Grantee.—State's Liens or Incumbrances.—School-Fund Mortgage.*—The purchaser and grantee of real estate, under a tax sale and deed, takes his title to such real estate under the provisions of section 6479, R. S. 1881, subject to all the claims which the State may have thereon for taxes, or other liens or incumbrances, such as a mortgage executed thereon to the State, as a security for the payment of a loan of its school fund, prior to such tax sale and the execution of such tax deed. This is so, although the taxes, for which the real estate was sold, had been assessed and delinquent long before the execution of such school-fund mortgage. *State, ex rel.*, v. *Jones*, *175*

6. *Voluntary Payment.*—Without a statute authorizing it, no recovery can be had for taxes voluntarily paid, although paid under protest. *Durham* v. *Board, etc.*, *182*

7. *Same.—Refunding of.—Complaint.*—A complaint under section 5813, R. S. 1881, to recover taxes alleged to have been wrongfully assessed, must show, not only that the assessment was unauthorized and irregular, but also that the property was not justly subject to the assessment. *Ib.*

8. *Warranty.—Breach.—Unpaid Taxes.—Receipt.—Order of Evidence.*—If an action or defence be founded upon an alleged breach of warranty in that a grantee has been forced to pay taxes assessed against the grantor upon the property conveyed, it is a harmless error to exclude the tax receipt, where the grantor declines to introduce other evidence showing that such taxes had been properly assessed by officers having due authority. *Hanna* v. *Fisher*, *383*

TELEGRAPH.

1. *Failure to Transmit Message Beyond State.—Penalty.—Constitutional Law.—Interstate Commerce.—Police Power.*—The statute, R. S. 1881, section 4176, imposing a penalty upon a telegraph company for failure to transmit a message as therein required, even as applied to a message sent to another State, is not a violation of the Constitution of the United States giving to Congress the power to regulate commerce between the States, but is a valid exercise of the police power which belongs exclusively to the States. *Western Union Tel. Co.* v. *Pendleton*, *12*

2. *Same.—Statute Construed.*—The sender of the message has the right to recover the penalty given by the statute. It is a penalty for a breach of duty arising in this State, and not damages for the breach of contract, and the right to recover is not affected by the fact that the particular act constituting the specific breach of duty occurred in another State. *Ib.*

3. *Complaint to Recover Penalty for Failure to Transmit Message.—Statute Construed.*—Section 4176, R. S. 1881, is penal and must be strictly construed, and in a suit before a justice of the peace to recover the penalty, the complaint must aver, and the evidence prove, that the sender of the message had paid or tendered the usual charges, at the time of sending it. *Western Union Tel. Co.* v. *Mossler*, *29*

4. *Failure to Transmit Message.—Complaint.—Copy of Telegram.*—In an action against a telegraph company, to recover the statutory penalty for failure to transmit a message, the complaint need not set out a copy of the message. *Western Union Tel. Co.* v. *Meredith*, 93

5. *Same.—Contract Exempting Company Void.—Limitation.*—A contract between the company and the sender, absolving the former from liability for its negligence, is void, but a contract that claims for such damages must be presented within sixty days after the act complained of is valid. *Ib.*

6. *Same.—Statute Constitutional.*—The statute of this State making telegraph companies liable to a penalty for failure to transmit, etc., is not in violation of the Federal Constitution. *Ib.*

7. *Same.—Negligence beyond State Limits.*—Such action lies where the act complained of occurred beyond the limits of this State, if the message was delivered to the company within this State. *Ib.*

8. *Failure to Transmit Message.—Contract.—Penalty.*—While a telegraph company can not, by contract, avoid the liability for the penalty imposed by R. S. 1881, section 4176, it may contract that a claim for that penalty shall be made to it within a reasonable time, and, in the absence of special circumstances, sixty days is not unreasonable. *Western Union Tel. Co.* v. *Jones*, 223

TENANTS IN COMMON.

See PARTITION; WILL, 1, 4.

TENDER.

See CONTRACT, 17; SALE, 7; TELEGRAPH, 3.

TIME.

See CONTRACT, 6; CRIMINAL LAW, 1; DECEDENTS' ESTATES, 8; EXECUTION.

TITLE.

See CONTRACT, 5, 15; PARTITION, 1 to 3; PRINCIPAL AND AGENT, 1, 2, 4; REDEMPTION, 1 to 3; REPLEVIN; SALE, 5; SUPREME COURT, 14; TAXES, 5; WILL, 1.

TORT.

See ASSAULT AND BATTERY; FALSE IMPRISONMENT; GUARDIAN AND WARD, 2; SHERIFF, 4; SLANDER; TRESPASS.

TOWN.

1. *Ordinances.—Publication.—Pleading before Justices.*—In a suit before a justice of the peace for the violation of a town ordinance, it is not necessary to aver that the members of the board of trustees which passed it were duly elected, nor that they had authority to pass the ordinance, nor that it had been published. *Hardenbrook* v. *Ligonier*, 70

2. *Same.—Constitutional Law.—Penalty.—Imprisonment.*—A penalty for the violation of a town ordinance is not a debt, in the sense of the Constitution, which forbids imprisonment for debt. *Ib.*

TRANSCRIPT.

See BILL OF EXCEPTIONS; INTERROGATORIES TO JURY, 1; JUDGMENT, 1, 2; NEW TRIAL, 2, 3; SUPREME COURT, 2, 14.

TRESPASS.

See ASSAULT AND BATTERY; FALSE IMPRISONMENT; GUARDIAN AND WARD, 2; HIGHWAY, 3, 4; RAILROAD, 10; SHERIFF, 4.

1. *Practice.—Damages.—New Trial.—Supreme Court.*—Error in awarding too small an amount as damages, in an action for an alleged trespass in ejecting the plaintiff from a house, must be made ground of a mo-

tion for a new trial, or it can not be considered by the Supreme Court on appeal. *Mackison* v. *Clegg*, 373

2. *Same.—Costs.*—Where, in such an action, the plaintiff recovers but one cent damages, he is entitled to judgment for but one cent costs. *Ib.*

TRIAL.

See GRAVEL ROAD, 2; HIGHWAY, 1; PRACTICE, 7, 17.

TRUST AND TRUSTEE.

See PRINCIPAL AND AGENT; VOLUNTARY ASSIGNMENT.

1. *Statute of Limitations.—Action to Set Aside Trustee's Final Report.—Decedents' Estates.*—In an action to set aside, as fraudulent, the final report of one who, under a will, had been appointed by a probate court to execute a trust created by the will, it is no defence to set up the three years' statute of limitations governing such actions against administrators, executors or guardians. *Boyd* v. *Caldwell*, 392

2. *Same.—Amendment of Complaint, Changing Parties and Nature of Action.*—There is no error in permitting the relator in an action by the State, on a trustee's bond, against the trustee and his sureties, to so amend his complaint as to make it an action by the relator as plaintiff, against the trustee alone, to set aside, as fraudulent, the defendant's final report. *Ib.*

VALUE.

See INTOXICATING LIQUOR, 3.

VARIANCE.

See PRACTICE, 7.

VENDOR AND VENDEE.

See CONTRACT, 5; CONTRIBUTION; MORTGAGE, 5 to 7, 11, 12; PROMISSORY NOTE, 4 to 6; TAXES, 5, 8.

1. *Real Estate.—Equitable Vendor.—Lien.—Volunteer.*—Where B. furnished the money and paid for certain real estate for the use of a church as a parsonage and dwelling for the priest of such church, under an agreement that he was to have and hold such real estate and a specific lien thereon, and the equitable title thereto, until the money so furnished was repaid to him; and where, under such agreement, by the procurement of B. and in conformity with the polity of the church, the deed of the real estate was made direct to D., a bishop of such church, who was a mere volunteer and paid nothing for such real estate.

Held, that practically, as between B. and D., the former was the equitable vendor, and the latter was the vendee, of such real estate.

Held, also, that for the amount of money so furnished and paid by B. in the purchase of the real estate, and remaining unpaid, he had the equitable lien of a vendor, and could enforce the same against the real estate in the hands of D. *Dwenger* v. *Branigan*, 221

2. *Warranty.—Breach.—Unpaid Taxes.—Receipt.—Order of Evidence.*—If an action or defence be founded upon an alleged breach of warranty in that a grantee has been forced to pay taxes assessed against the grantor upon the property conveyed, it is harmless error to exclude the tax receipt, where the grantor declines to introduce other evidence showing that such taxes had been properly assessed by officers having due authority. *Hanna* v. *Fisher*, 383

VENDOR'S LIEN.

See PROMISSORY NOTE, 5, 6; VENDOR AND VENDEE, 1.

VENIRE DE NOVO.

See PRACTICE, 12; REPLEVIN, 2; SPECIAL FINDING, 2; VERDICT, 1, 3.

VENUE.

See CONTRACT, 2; RAILROAD, 4, 9; SUPREME COURT, 21.

VERDICT.

See CRIMINAL LAW, 22; INTERROGATORIES TO JURY; PLEADING, 13; PRACTICE, 12; REAL ESTATE, ACTION TO RECOVER; REPLEVIN, 2; SUPREME COURT, 11, 14.

1. *Special Verdict.—Venire de Novo.—Practice.*—A special verdict is not defective for failure to find as to immaterial matters put in issue, but if it find all material issues, a *venire de novo* should not be awarded. *Johnson* v. *Putnam*, 57

2. *Same.*—If a special verdict fail to find on any material issue, it has the effect of a finding against the party who had the burden of that issue. *Ib.*

3. *Same.—Presumption.*—It is the office of a special verdict to find only the facts established by the evidence, and therefore, if there be no finding upon an issue, the presumption is that there was no evidence upon it, and a *venire de novo* should not be awarded. *Ib.*

4. *Special Verdict.—Judgment.*—A plaintiff is not entitled to judgment on a special verdict which does not find all the facts which it was necessary he should prove. *Vinton* v. *Baldwin*, 433

5. *Same.—New Trial.—Practice.*—Where a special verdict fails to find the facts which were established by the evidence, a motion for a new trial is the proper remedy. *Ib.*

6. *Juror.*—Neither the affidavit of a juror nor his statements can be used to set aside a verdict. *Long* v. *State*, 481

VOLUNTARY ASSIGNMENT.

1. *Refusal of Trustee to Sue.—Collusion.—Assignor and Trustee.—Creditors.—Joinder.*—Where, under a voluntary assignment by an embarrassed or failing debtor of all his property, in trust for the benefit of all his *bona fide* creditors, a cause of action accrues to the trustee, of or concerning the trust estate, which he wrongfully refuses to enforce by suit, or where there is apparent collusion between such assignor and his trustee, by means of which the trust property is wasted or sacrificed, the creditors of the assignor, as the beneficiaries of the trust, may sue in their own names, and, having a unity in interest in the object of the suit, they may join in the same complaint and maintain a joint action. *Wright* v. *Mack*, 332

2. *Same.—Embarrassed or Failing Debtor.—Preferred Creditor.—Chattel Mortgages.—Wrongful Conversion of Trust Property.—Collusion between Assignor, Trustee and Mortgagees.—General Creditors.*—An embarrassed or failing debtor, before the execution of a voluntary assignment of *all* his property in trust for the benefit of *all* his *bona fide* creditors, may lawfully mortgage his property to secure his valid and subsisting debts to some of his creditors, in preference to his other creditors. But where, in such case, after the execution of his voluntary assignment, the acts of the assignor and his mortgagees, in collusion with his trustee, are such as show the wrongful conversion of the trust property from the purposes of the trust, they and each of them will be liable to the general creditors, as beneficiaries in the trust, for their damages resulting from such conversion. *Ib.*

VOLUNTARY PAYMENT.

See TAXES, 6, 7.

1. *Protest.—Redemption of Real Estate from Sheriff's Sale.*—In an action to enforce a mechanic's lien on real estate, the plaintiff recovered, and it was adjudged that a certain prior mortgage on the real estate, the

mortgagee being a party and defaulted, was junior and subordinate to such lien. The property was purchased under the judgment by the judgment plaintiff. In a suit to review the judgment brought by the mortgagee, judgment was rendered against him, from which he appealed. The year for redemption from the sale being about to expire, and the mortgagor being insolvent, the mortgagee paid the redemption money to the clerk of the court for the purchaser, who received it from the clerk. At the time of the payment, the mortgagee notified the purchaser of the purpose of the former to prosecute an appeal, and filed with the clerk a written protest, reserving therein the right to recover the redemption money if the judgment appealed from should be reversed. After the expiration of the year for redemption the mortgagee through his appeal obtained such a reversal; afterwards the first named judgment was adjudged void as to the mortgagee. Thereafter, the mortgagee, having foreclosed his mortgage and having purchased the property and taken possession thereof under such foreclosure, demanded repayment of the redemption money from the purchaser who had so received it from the clerk.

Held, that the payment was voluntary, and that the money so paid for redemption could not be recovered. *Connecticut, etc., Ins. Co.* v. *Stewart, 588*

2. *Taxes.*—Without a statute authorizing it, no recovery can be had for taxes voluntarily paid, although paid under protest.

Durham v. *Board, etc., 182*

WAIVER.

See PLEADING, 5; PRACTICE, 12; SUPREME COURT, 7.

WARRANTY.

See CONTRACT, 16, 17; SALE; TAXES, 8; VENDOR AND VENDEE, 2.

WEIGHT OF EVIDENCE.

See BILL OF EXCEPTIONS, 2; SUPREME COURT, 9, 10, 22, 24, 26.

WIDOW.

See DECEDENTS' ESTATES, 2 to 4.

Election Under Will.—A widow, to whom a life-estate is devised in lieu of her interest in her husband's land, manifests her intention to take under the will by claiming such life-estate as exempt from execution.

Barkley v. *Mahon, 101*

WILL.

See PARTITION, 1 to 3; TRUST AND TRUSTEE; WIDOW.

1. *Construction of.—Devise to One and "Her Children After Her."—Life-Estate.*—A testator, after devising a portion of his estate to his children "as tenants in common," but that the share of one daughter should be less than the shares of the other children, provided that her share "shall descend to her and her children after her, free from and beyond any control of her husband, * * and unincumbered from any of the debts and liabilities of his, forever."

Held, that she took in fee-simple, and not a mere life-estate.

Lennen v. *Craig, 167*

2. *Devise.—Legacy.—Equitable Lien.*—When lands are devised to one who, by the will, is directed to pay a legacy, the legacy is a charge upon the lands devised, and when payment of the legacy is made a condition of the devise, its acceptance creates also a personal liability to the legatee which may be enforced without resorting to the land, the lien still remaining as a security.

Porter v. *Jackson, 210*

3. *Same.—Receiver.—Complaint.—Appeal, Plea in Bar of.*—Lands devised to several, on condition that if they took they should pay a certain legacy, were, upon suit for partition to which the legatee was not a

party, sold by a commissioner by order of the court, for full value, paid upon being appraised as unencumbered. While the money remained in the custody of the court, the purchaser brought suit against the devisees and legatee to quiet his title as against any lien for the legacy, or to charge it primarily on the fund in the custody of the court, averring the foregoing facts by his complaint, and also that the devisees were insolvent.

Held, that the complaint was good on demurrer, to compel resort to the fund in court primarily to satisfy the legacy, and for the appointment of a receiver to take charge of the fund and so apply it, unless the devisees would secure such application by sufficient bond.

Held, also, that a plea in bar of the appeal to the Supreme Court by the plaintiff below, averring that after the appeal he purchased the shares of some of the devisees in the fund in court, was bad on demurrer. *Ib.*

4. *Joint Will by Owner in Common.*—Owners in common may dispose of their common property by a joint will, and, upon the death of both, leaving the will unrevoked, it can be admitted to probate.
Black v. *Richards*, *184*

5. *Same.—Uncertainty of Description.—Evidence.*—A will, attempting to devise real estate, described it as follows: "The west half of the southwest fr., section (19) nineteen, township (22), range (1 W.), contain (72) seventy-two and (40) hundredths acres," but it did not name the state or county, nor whether the township was "north" or "south."

Held, that, under the modern rule, that the thing devised may be identified by parol evidence, the will is not void for mere uncertainty of description. *Ib.*

WITNESS.

See CRIMINAL LAW, 19, 20; EVIDENCE, 2, 5; MALPRACTICE, 2; PRACTICE, 11.

Promissory Note.—Assignee of Administrator.—In a suit against the maker upon a note lawfully sold by the administrator of the deceased payee to the plaintiff, the defendant is not a competent witness in his own behalf. *Reynolds* v. *Linard*, *48*

WORDS AND PHRASES.

See CRIMINAL LAW, 13; MALPRACTICE, 5.

WRITTEN INSTRUMENT.

See CONTRACT, 16; MORTGAGE, 5, 6, 8 to 11; NEW TRIAL, 3.

END OF VOL. 95.